1990

George K. Schoney and Erma J. Schoney, et al. v. Memorial Estates Inc., et al. : Brief of Respondent

Utah Supreme Court

Earl J. Peck; Nielson and Senior; Stephen L. Henroid; Henroid and Henroid; Attorneys for Respondents.
Robert J. Debry; Robert J. Debry and Associates; Attorneys for Appellants.

IN THE SUPREME COURT FOR THE STATE OF UTAH

GEORGE K. SCHONEY and ERMA J. SCHONEY, et al.	)	
Plaintiffs/ Appellants,	)	
vs.	)	
MEMORIAL ESTATES INC., et al.	)	Case No. 900274
Defendants/ Respondents.	)	

BRIEF OF RESPONDENT

Petition for Writ of Certiorari to review a decision of the Utah Court of Appeals.

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Attorneys for Respondents

IN THE SUPREME COURT FOR THE STATE OF UTAH

GEORGE K. SCHONEY and ERMA J. SCHONEY, et al.	)	
Plaintiffs/ Appellants,	)	
vs.	)	
MEMORIAL ESTATES INC., et al.	)	Case No. 900274
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TABLE OF AUTHORITIES

CASES CITED

RULES CITED

QUESTION PRESENTED

The sole issue presented by this petition is whether the decision of the Court of Appeals should be reviewed by this court because of an abuse of discretion by the Court of Appeals.

CONTROLLING PROVISIONS

Rule 37, Utah Rules of Civil Procedure, W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977).

STATEMENT OF CASE

Plaintiffs filed a complaint on June 17, 1982, alleging that defendants had sold pre-need mausoleum spaces to plaintiffs, having no intention of ever building a mausoleum. In 1976 and 1985 the mausoleums in question were built.

December 2, 1987, defendants moved for summary judgment. (R. 1200) After considering the parties' oral and written arguments the court indicated it was inclined to grant defendants' motion. Plaintiffs responded asking for leave to file a fifth amended complaint, for the purpose of clearly stating a valid cause of action which would survive the arguments raised in defendants' motion for summary judgment. The court denied defendants' motion without prejudice and

granted plaintiffs' leave to amend. (R. 1301) Said complaint was also supposed to narrow the claims before the court.

In fact, plaintiffs' Fifth Amended Complaint only broadened the scope of plaintiffs' contentions, and added several new theories and claims not previously alleged. For example, plaintiffs alleged for the first time that the mausoleum, as built, breached a warranty regarding its appearance, and alleged that defendants, some five years and seven months before, maliciously refused to disinter a Mr. Wheeler, Mrs. Schoney's father, when his disinterment was requested by plaintiffs. (R. 1312)

Prior to receiving defendants' Answer to the Fifth Amended Complaint, plaintiffs requested an expedited trial setting. (R. 1336-1339, 1343) Plaintiffs' motion for an expedited trial setting was set for hearing on February 17, 1988. (R. 1342) Plaintiffs were not represented at the hearing, at which a discovery cutoff date (June 10, 1988), a motion cutoff date and the trial date (July 6, 1988) were set. (R. 1360)

On April 29, 1988, defendants' Fourth Set of Interrogatories to Plaintiffs were served on plaintiffs by mail. (R.1361-62) Plaintiffs failed to answer within the 30-day time to answer and failed to answer by the discovery cutoff.

Defendants' counsel contacted the office of plaintiffs' counsel between June 3 and June 12 to get answers to the interrogatories. (R. 1398, tr. 5-6)

June 14, 1988, defendants filed a new motion for summary judgment containing the same arguments raised in December 1987, plus arguments relating to the new causes of action raised in the Fifth Amended Complaint. (R. 1363, 64)[1] Defendants also moved to strike plaintiffs' Fifth Amended Complaint for failing to respond to discovery. (R. 1363-63)

After receiving written submissions and hearing oral argument, the trial court granted both motions. (R. 1372, 78-79)[2] Only at the hearing did the plaintiffs deliver their purported Answers to Interrogatories. Neither answers nor a certificate of service of answers are part of the record of this case.[3]

Plaintiffs filed a Notice of Appeal to this Court. Their Docketing Statement and Briefs state that the summary judgment is appealed but do not state or argue that the order entering default judgment pursuant to Rule 37 was not proper. (See Appendix, Exhibit A (Docketing Statement), Exhibit B (Appellants' Brief), Exhibit C (Respondents' Brief), and Exhibit D (Reply Brief). This court poured the appeal over to the Utah Court of Appeals.

While the matter was pending before the Court of Appeals, plaintiffs filed a Petition for Writ of Mandamus and a

Petition to Recall Jurisdiction in an attempt to circumvent the Court of Appeals in its consideration of the matter.

The Court of Appeals after a full and fair hearing before a panel consisting of Judges Billings, Garff and Orme affirmed the Default Judgment, determining that consideration of the grant of summary judgment was not necessary. Thereafter, this Petition for Certiorari was filed.

The appeal and all subsequent petitions have been filed solely to avoid the consequences of the failure to respond to defendants' motion for summary judgment and submit facts to controvert facts submitted by defendants sufficient to provide a genuine issue of material fact, and to answer defendants' interrogatories in order that defendants could make their final motions and go to trial as scheduled without prejudice.[4]

ARGUMENT

I

THE TRIAL COURT AND THE COURT OF APPEALS EACH APPLIED ESTABLISHED UTAH LAW TO THE UNDISPUTED FACTS OF THIS CASE AND RULED PROPERLY.

When viewed in their proper context these arguments are merely plaintiffs' excuses and attempts to shift responsibility from their own conduct and failure to comply with basic rules of procedural fairness, and their claim is simply that the striking of their complaint and consequent imposition of Default Judgment for failure to answer Interrogatories was too harsh a sanction in this case.

The only basis under Rule 47 of the Utah Rules of Appellate Procedure to justify certiorari is (c)

> When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision;

As set forth in the facts stated above, after requesting and receiving an expedited trial date plaintiffs failed to answer defendants' final set of interrogatories which inquired into issues raised for the first time in plaintiffs' Fifth Amended Complaint. The issue of sanctions for failure to answer arose only after defendants' informal efforts failed to result in any response. (R. 1398, tr. 5-6)[5]

Plaintiffs' Petition is fraught with innuendo, misstatements and half truths to bolster their contentions. For example, plaintiffs allege "Memorial Estates acknowledged receiving unsigned answers to its discovery on June 15. (Tr. p. 4 l. 20, R. 1398) (Exhibit E) Signed answers were served on June 20, 1988. (R. 1292)" (Exhibit F) Neither statement is true or supported by the record.[6] The first purported Answers to Interrogatories, signed or unsigned, ever served or delivered were hand delivered by counsel for plaintiffs at the courthouse just prior to the hearing on June 21, 1988. (R. 3, 6, attached hereto as Exhibit E)

The trial court, instead of departing from the accepted and usual course of judicial procedure as alleged by

plaintiffs, followed Rule 37 of the Utah Rules of Civil Procedure and the case of W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977).

Rule 37(d) of the Utah Rules of Civil Procedure provides that if a party fails to serve answers to interrogatories:

> The court in which the action is pending, on motion, may make such orders in regard to the failure as are just, and among others, it may take any action authorized under paragraphs (A) (B) and (C) of subdivision (b)(2) of this Rule.

Rule 37(b)(2)(C) provides that such action by the Court may include:

> . . . dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party; . . . .

In the case of W.W. & W. B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977), just as in this case, the lower court granted a summary judgment and at the same time, granted judgment by default as a sanction pursuant to Rule 37(d). In Gardner, the defendants contended the sanction was inappropriate because they had served answers to the interrogatories prior to the hearing on the motion for a default judgment. The court rejected that argument stating that if a party fails to answer within the specified time under the rule, that party has failed to answer and the court may appropriately invoke the sanction of dismissal. Addressing the issue of judgment by default as a sanction, the court commented on the 1972 amendment to the rule as follows:

> Rule 37(d) allows the imposition of sanctions against a party for especially serious disregard of the obligations imposed upon him by the discovery rules even though he has not violated any court order . . . . Until 1970, the rule applied only if a failure by a party was willful. This limitation has been eliminated. In addition, the rule now says, as Rule 37(b)(2) always has said, that the court is to make "such orders with regard to the failure as are just." Taken together, these two changes mean that any failure of the sort described in Rule 37(d) permits invocation of the rule, regardless of the reason for the failure, but that the court has discretion about the sanction to be imposed.

Gardner at 737, See also 8 Wright & Miller Federal Practice and Procedure §2291 pp. 807-802

The Gardner court agreed that the trial court was justified in finding there was no reasonable excuse for the failure to comply with Rule 33. The court further stated paraphrasing the case of Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols, 183 Ga. App. 593, 226 S.E.2d 742, 743 (1976):

> . . . there was no significance in the fact plaintiff submitted answers to the propounded questions before the hearing on defendant's motion for sanctions. The court ruled once the motion for sanctions has been filed, the opposing party may not preclude their imposition by making a belated response in the interim between the filing of the motion for sanctions and the hearing on the motion.

The Gardner court reiterated that sanctions are appropriate whether a party has moved pursuant to Rule

37(a)(2) for an order compelling the other party to respond to discovery, or not, and further stated:

> The extreme sanction of default or dismissal must be tempered by the careful exercise of judicial discretion to ensure its imposition is merited. Under Rule 37(d), sanctions are justified without reference to whether the unexcused failure to make discovery was willful. The sanction of default judgment is justified where there has been a frustration of the judicial process vis., where the failure to respond to discovery impeded trial on the merits and makes it impossible to ascertain whether the allegations of the answer have any factual merit.
>
> A defendant may not ignore with impunity the requirements of Rules 33 and 34 and the necessity to respond within 30 days, to request additional time or to seek a protective order under Rule 26(c). A party to an action has a right to have the benefits of discovery procedure promptly, not only in order that he may have ample time to prepare his case, but also in order to bring to light facts which may entitle him to summary judgment or induce settlement prior to trial.

Gardner at 738.

This case is somewhat like the anecdote of the five blind men trying to describe the elephant. Plaintiffs' various positions and causes of action have been difficult to understand and to relate to the other positions and causes of action. Defendants needed the answers to interrogatories in order to understand the latest causes of action and the alleged facts supporting them. Whether or not the sanction of dismissal is normally imposed in cases of default is not applicable to this case. Since 1982 not only have plaintiffs

attempted to file five amended complaints, they have also subjected the courts to numerous (at least four) petitions for extraordinary relief. Because of the number of plaintiffs' claims, past and present, and the constant revision and amendment defendants were not only entitled to the answers to their final interrogatories, the answers were necessary for consideration of the final dispositive motions and for trial preparation, if necessary.[7]

Plaintiffs' failure to respond to the interrogatories further prejudiced the defendants by effectively preventing them from following up on their timely discovery request when trial was set to commence only two weeks away.[8]

In addition while no motion to compel had been filed by defendants the lower court had set discovery cutoff with defendants' final discovery specifically at issue and specifically in light of the plaintiffs' request for and obtaining of an expedited trial date.

Defendants have not attempted to delay, but have only attempted to get a grasp of plaintiffs' ethereal theories.

The imposition of sanctions is discretionary with the trial court. The circumstances warranting sanctions are undisputed. The sanction of default judgment is specifically mentioned in Rule 37. The scope of the Court of Appeals inquiry is limited to whether the trial court abused its discretion. The Court of Appeals properly concluded the trial court did not abuse its discretion.

II

THE PLAINTIFFS FAILED TO APPEAL OR EVEN ADDRESS THE ENTRY OF DEFAULT JUDGMENT PURSUANT TO RULE 37

All of the argument contained in the Petition for Writ of Certiorari, regarding the sanction of default judgment, is raised for the first time at this late date. Said argument was not raised in the trial court in response to defendants' Motion to Strike. Review of the appeal file containing plaintiffs' docketing statement, Appellants' Brief and Reply Brief reveals no argument whatsoever on the issue of default judgment. Plaintiffs did not argue that they should not be sanctioned unless their failure was willful. (R. 1398)

Arguments should not be first raised in a Petition for Certiorari, when the issues could have been raised and considered in the Court of Appeals, but were not. Because plaintiffs failed to appeal or brief the instant issue before the Court of Appeals, they are precluded from claiming that the careful decision of the Court of Appeals now warrants exercise of this court's discretionary review. The Court of Appeals properly upheld the trial court decision. See, Bennion v. Hansen 699 P.2d 757 (Utah 1985); Zions First Nat'l Bank v. Nat'l Am. Title Insurance Co., 749 P.2d 651, 655 (Utah 1988).

CONCLUSION

The Argument that the Court of Appeals has "usurped the trial court's power" is a conclusion not justified by a review of the facts and decision. The Court of Appeals only upheld the trial court's use of power and discretion. Plaintiffs fail to identify any particular in which the Court of Appeals exercised discretion. An appellate court is required to uphold the trial court's ruling when at all possible. Mel Trimble Real Estate v. Monte Vista Ranch, 758 P.2d 451 (Utah 1988); Bennion v. Hansen, supra; Bill Nay & Sons Excavating v. Neeley Construction Co., 677 P.2d 1120 (1984).

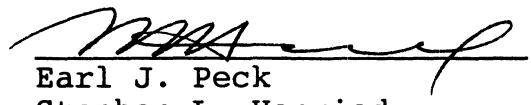
This case presents no special or important reason to warrant exercise of the Court's discretionary review jurisdiction. There are no disputed facts regarding the failure to answer and the sanctions. The courts below applied established principles of law in deciding the legal issue presented. The petition should be denied.

MOTION FOR ATTORNEY'S FEES

Pursuant to Rule 33 of the Utah Rules of Appellate Procedure defendants move the court for an order granting their attorney fees on the grounds that plaintiffs' petition is frivolous, not grounded in fact, not warranted by existing law and not based upon a good faith argument.

DATED this 6 day of July, 1990.

Respectfully submitted,



Earl J. Peck
Stephen L. Henriod
Attorneys for Defendants

1.Plaintiffs contend that two identical summary judgment motions were denied. One was denied on June 24, 1985, when plaintiffs' discovery had not been completed (R. 693). The subsequent motion dated December 29, 1988, was denied without prejudice so plaintiffs could attempt to rehabilitate their complaint with the fifth amended complaint setting into motion the chain of events leading to the summary judgment and default judgment. It is true that each motion argues that for summary judgment is proper because plaintiffs had failed to sustain any cause of action, however, there is no basis here to argue that hearing a subsequent motion for summary judgment after allowing a party additional time to correct fatal deficiencies is in any way improper.

2.The contention is made several times that the trial court admitted it "had not read the file". As evidenced by the June 21, 1988, transcript, it is clear that the court had not re-read the file immediately prior to the hearing on June 21, 1988, but that it was thoroughly familiar with the case from oral argument and its prior hearings.

3.Plaintiffs imply by consistently stating "Memorial Estates claims to have mailed . . ." (emphasis added) that plaintiffs Fourth Set of Interrogatories were not served on April 29, 1988, as the certificate of service, signed by counsel, states they were. No facts in support of this contention are cited by plaintiffs. Counsel for defendants personally mails documents when the certificate is so executed.

4.Much of the record is cited regarding the discovery history of the case, obviously in an attempt to make it appear that the defendants were derelict in their duty to respond to discovery. The plaintiffs never by motion or otherwise prior to appeal complained about any alleged delay or failure to answer or the content of any discovery responses of defendants, and the Court of Appeals properly declined to consider such contentions made for the first time on appeal. See, e.g. Zions First Nat'l Bank v. National Am. Title Ins. Co., supra.

5.Plaintiffs in their Questions for Review and Point I of their Argument label the failure to answer interrogatories as "excusable neglect" as if such a finding had been made. The failure was not characterized by the trial court as other than a "failure to answer" as required by Rule 37. It was not excusable and no reasons were offered to excuse the failure.

6.Plaintiffs contend as facts that defendants received and acknowledged receipt of interrogatory answers before June 21. This is not true, and of the two record citations which do not support the statements, (1) Tr. p. 4, l. 20, R. 1398 (Exhibit E) is the statement of counsel for defendants at the June 21, 1988 hearing that plaintiffs were served the interrogatories regarding the Fifth Amended Complaint. The transcription is confusing but it obviously is not acknowledgment of receipt of answers (see Exhibit F), and (2) R. 1292 (Exhibit F) is a certificate of service by defendants to plaintiffs of certain supplementary answers to interrogatories on January 12, 1988.

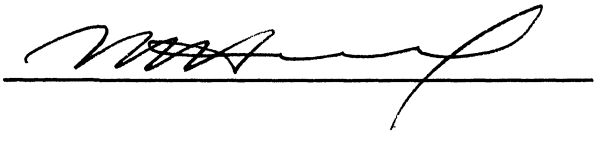
7.Plaintiffs' attempt to distinguish Gardner, supra, because in Gardner the court characterized the party sanctioned as one whose "persistent dilatory tactics frustrated the judicial process", apparently not realizing that plaintiffs tactics in this case have frustrated the judicial process to defendants' prejudice particularly with respect to defendants' motion for summary judgment and preparation for trial.

8.The cases cited by plaintiffs in Point I of their Argument hold consistently on one issue, namely that it is within the discretion of the trial court to award sanctions. Some discuss "willful failure", none discuss "excusable neglect", and none is a case in which a court's sanction for failure to answer under Rule 37 as it presently exists has been reversed. The cases requiring "willful neglect" predate the 1972 amendment which eliminated the requirement of "willful neglect" to award sanctions. See e.g. 8 Wight & Miller, Federal Practice and Procedures §2291, page 807-812, supra.

MAILING CERTIFICATE

I hereby certify that the foregoing BRIEF OF RESPONDENT was mailed first class, postage prepaid on the 6 day of July, 1990, to:

Robert J. DeBry
4252 South 700 East
Salt Lake City, Utah 84107



Appendices

Exhibit A

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IN THE UTAH SUPREME COURT

GEORGE K. SCHONEY and ERMA J. SCHONEY, et al. Plaintiffs/Appellants, vs. MEMORIAL ESTATES, INC., et al., Defendants/Respondents.	DOCKETING STATEMENT (Subject to assignment to the Court of Appeals) Case No.

COMES NOW Appellant, pursuant to Rule of Utah Supreme Court 9, and submits the following docketing statement.

JURISDICTIONAL AUTHORITY

This appeal is filed pursuant to Utah Code Ann. §78-2-2(3)(i)(as amended 1986).

NATURE OF THE PROCEEDINGS

This is an appeal from a final judgment of the Third Judicial District Court granting defendant's motion for summary judgment as to all claims of plaintiffs.

JUDGMENT DATE

The judgment appealed from was entered July 18, 1988. Plaintiffs' notice of appeal was filed on August 16, 1988.

STATEMENT OF FACTS

In 1974, plaintiffs entered into a contract with defendant for purchase of mausoleum space in an unconstructed mausoleum. The contract provided that defendant would build a mausoleum when one-half the spaces for the mausoleum were sold. The contract also promised plaintiffs the use of a chapel on the cemetery grounds for funeral services. Plaintiff Erma Schoney's parents also purchased pre-need mausoleum space at the same cemetery. Plaintiffs brought suit alleging that the mausoleum had not been built timely, and that the cemetery chapel had been rented to an insurance company. Plaintiffs also alleged that the mausoleum ultimately built (several years after this lawsuit was filed) was different in appearance from the appearance represented to them at the time of purchase in 1974. Plaintiffs' Complaint alleged breach of contract and fraud.

In 1975, plaintiff Erma Schoney's father died, and was interred in the ground at defendant's cemetery. Plaintiffs' suit alleged that this ground burial was made because

defendant promised that the mausoleum would be constructed in six months. In early 1987, plaintiff Erma Schoney's mother purchased mausoleum space in another cemetery. Plaintiffs allege that they requested permission to disinter Erma's father, but that defendants refused to allow it until the morning of the funeral of plaintiff, Erma Schoney's mother. Plaintiffs also alleged that defendants lost the location of plaintiff Erma Schoney's father. Plaintiffs' suit alleged that defendant's conduct constituted an intentional infliction of emotional distress.

The contract payments made by plaintiffs were not held in trust for construction of the mausoleum, but were used for business purposes. Plaintiffs allege that this was in violation of an oral trust agreement, and in violation of statute governing pre-need cemetery sales. Plaintiffs also alleged that the contract required formation of a trust which was not done.

Plaintiffs' action was originally certified by Judge Fishler as a class action on behalf of all pre-need mausoleum contract holders. Two years later, Judge Dee "decertified" the class.

ISSUES PRESENTED ON APPEAL

1. Did the trial court err in concluding, as a matter of law, that defendant had not breached its contract to build mausoleum space, provide chapel space and to establish a contractual trust?

2. Should a jury have been allowed to decide whether plaintiffs suffered emotional distress from defendant's breach of contract?

3. Were all plaintiffs' claims barred as a matter of law by the statutes of limitation?

4. Did Judge Dee abuse his discretion by "decertifying" a class of contract holders previously certified by another district court judge?

5. Whether defendant's conduct regarding the disinterment of plaintiff Erma Schoney's father could give rise to intentional infliction of emotional distress?

6. Was the trial court in error in dismissing plaintiffs' claims for breach of statutory, common law and contractual trusts?

7. Did plaintiffs' evidence fail to raise an issue of fact regarding fraud or misrepresentation of defendant's intentions to build a mausoleum, to provide chapel space, and to establish trusts?

DETERMINATIVE AUTHORITY

1. All the issues listed above (except No. 4) were originally decided in plaintiffs' favor by Judge Dee. Judge Moffat should not have changed rulings made by Judge Dee. Madsen v. Salt Lake County Sch. Bd., 645 P.2d 658 (Utah 1982). Likewise, Judge Dee should not have changed Judge Fishler's ruling regarding issue 4.

2. Plaintiffs' claims for fraud, breach of contract and deceptive consumer practices, were supported by affidavit and deposition testimony. Summary judgment should only be granted when there is no reasonable probability that plaintiffs can prevail. Snyder v. Merkley, 693 P.2d 64 (Utah 1984). A correct application of this standard is determinative of plaintiffs' appeal.

3. Plaintiffs' claims for breach of statutory trust is supported by Utah Code Ann. §8-4-12 and 13, and §22-4-1, et seq.

4. Plaintiffs' claims for mental distress from defendant's breaches of contract is an issue of first impression in Utah, as are plaintiffs' claims for breach of common law trust.

5. Plaintiffs' claim for intentional infliction of emotional distress is governed by Samms v. Eccles, 358 P.2d 344, 11 Ut.2d 289 (1961).

PRIOR APPELLATE PROCEEDINGS

Plaintiffs previously sought a writ of mandamus to direct Judge Dee to make findings of fact and conclusion of law to support his decertification order. The writ was granted on September 3, 1985. Plaintiffs sought a writ of mandamus to direct Judge Dee to allow filing of an amended Complaint. The petition was denied on November 18, 1985.

ATTACHMENTS

1. Exhibit A is a copy of the final judgment appealed from.

2. Exhibit B is a copy of plaintiffs' notice of appeal.

DATED this 29th day of September, 1988.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs/
Appellants

By: _____
ROBERT J. DEBRY

CERTIFICATE OF MAILING

I certify that on the 29th day of Sept, 1988, true and correct copy of the foregoing DOCKETING STATEMENT (George K. Schoney, et al. v. Memorial Estates, et al.), was mailed, postage prepaid, by depositing a copy of the same in the U.S. mail, to the following:

Arthur H. Nielsen
Joseph L. Henriod
David Swope
NEILSON & SENIOR
P. O. Box 11808
36 South State Street
Salt Lake City, Utah 84111

Linda L. Lora

/ek

Joseph L. Henriod (1468)
Earl Jay Peck (A2562)
Stephen L. Henriod (1469)
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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

GEORGE K. SCHONEY IRMA J. SCHONEY, et al., Plaintiffs, vs. MEMORIAL ESTATES, INC. et al., Defendants.	ORDER, SUMMARY JUDGMENT AND JUDGMENT BY DEFAULT Civil No. C82-4983 Judge Richard H. Moffat

Defendant Memorial Estates, Inc.'s:

(i) Motion to Strike George K. Schoney as a party plaintiff;

(ii) Motion to Strike Plaintiffs' Complaint and enter default judgment for failure to answer Defendant's Fourth Set of Interrogatories; and,

(iii) Motion for Summary Judgment came on for hearing at the final pre-trial pursuant to the Scheduling Order, Notice

and Stipulation of the parties. Plaintiffs were represented by counsel, Daniel F. Bertch. Defendant was represented by Earl Jay Peck and Stephen L. Henriod.

Having considered the motions, affidavits and other submissions, and the arguments of counsel, the Court enters the following orders:

Plaintiff George K. Schoney is dismissed as a party, it appearing that he died February 19, 1986, his death was suggested on the record on or before December 29, 1987 and no motion for substitution has been made.

Defendant's Motion for Summary Judgment is granted for the reason that based upon the pleadings and the uncontroverted affidavits and depositions, there is no genuine issue as to any material fact in any cause of action and defendant is entitled to its judgment as a matter of law.

Judgment should be entered upon the additional ground that plaintiff has failed to respond to Defendant's Fourth Set of Interrogatories. Plaintiff failed: To answer the interrogatories within the time to answer; to answer prior to the Court's designated last date to respond to all outstanding discovery; or to answer prior to the filing of Defendant's motion for sanctions. Said failure to answer impedes trial on

the merits and prejudices defendant's ability to prepare for the early trial date, set for July 6, 1988, requested by plaintiffs.

A judgment of no cause of action is, therefore, hereby entered in favor of defendants and against plaintiff Irma Schoney; defendants are awarded their costs herein, and George K. Schoney is dismissed as a party with prejudice.

DATED this 13 day of July, 1988.

ATTEST
H. DIXON HINDLEY
CLERK
By K Cochran
Deputy Clerk

BY THE COURT:

Richard H. Moffat
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed a true copy of the foregoing Order, Summary Judgment and Judgment by Default, postage prepaid, this 27 day of June, 1988, to:

Daniel F. Bertch
Robert J. DeBry
Robert J. DeBry & Associates
Attorneys for Plaintiffs
4001 South 700 East, 5th floor
Salt Lake City, Utah 84107

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS ___ DAY OF _____ 19__

DANIEL F. BERTCH - A4728
ROBERT J. DEBRY - A0849
ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiffs
4001 South 700 East, Suite 500
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Telephone: (801) 262-8915

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

GEORGE K. SCHONEY and ERMA J. SCHONEY, et al. Plaintiffs, vs. MEMORIAL ESTATES, INC., et al., Defendants.	NOTICE OF APPEAL Civil No. C82-4983 Judge Richard H. Moffat

Notice is hereby given that plaintiffs hereby appeal to the Supreme Court of Utah from the judgment entered against them in this action on July 18, 1988.

DATED this 15 day of August, 1988.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff

By /s/ Daniel F. Bertch
DANIEL F. BERTCH

CERTIFICATE OF MAILING

I certify that on the 15 day of August, 1988, true and correct copy of the foregoing NOTICE OF APPEAL, (George K. Schoney, et al. v. Memorial Estates, et al.), was mailed, postage prepaid, by depositing a copy of the same in the U.S. mail, to the following:

Arthur H. Nielsen
Joseph L. Henriod
David Swope
NEILSON & SENIOR
P. O. Box 11808
36 South State Street
Salt Lake City, Utah 84111

Linda Lark

/jj

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 23rd DAY OF August 19 88

H. DIXON HINDLEY, CLERK

BY Paula K. Litton DEPUTY

Exhibit B

IN THE UTAH COURT OF APPEALS

GEORGE K. SCHONEY and ERMA J. SCHONEY, et al. Plaintiffs/Appellants, vs. MEMORIAL ESTATES, INC., et al., Defendants/Respondents.	APPELLANT'S BRIEF Case No. 880630-CA Category No. 16(b)

ON APPEAL FROM THE THIRD DISTRICT COURT SALT LAKE COUNTY

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TABLE OF AUTHORITIES

Cases:

JURISDICTIONAL STATEMENT

Appellate jurisdiction is conferred pursuant to §78-2-2(3)(1) Utah Code Ann.. This case was poured over to the Court of Appeals pursuant to §78-2-2(4) Utah Code Ann.

STATEMENT OF FACTS

Defendant is in the business of providing cemetery and mausoleum spaces, funeral services, markers, caskets, and similar products. From 1972 to 1974, Defendant began a mausoleum sales program called "public relations sales program." (Moore depo. p.12). Mausoleums were to be located at a Redwood Road location and one at 3115 East 7800 South called the "Mountain View" location. Under this program, one-half the spaces of a proposed mausoleum were sold to families before construction (Id. at 9, 14-15). Once one-half of the mausoleum spaces were sold, construction would begin.[1] (Id.) This is called "pre-need" because the sale is made before the time of death. (Id. at 8.) The sales program represented to consumers that the pre-need price was at cost and did not include a profit. (Id. at 9.)

not in record

Sometime in 1973 or 1974, a salesman for defendant, Bill Nordin, called on the Schoney family to sell them spaces in a mausoleum. (Nordin depo. p.8.) After hearing Nordin's

not in record

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"usual presentation," the Schoneys purchased two spaces in an unconstructed mausoleum. (Nordin depo. p.9; Exhibit 1 to plaintiff's Complaint.) The purchase agreement (labeled the "Mausoleum Estate Agreement") obligated defendant in part:

> To provide use of the full service chapel ...
>
> * * *
>
> To complete the mausoleum with construc-truction. . . within one year from the date that the Public Relations Development Program on that is completed.

(Exhibit 1 to plaintiff's Complaint). The contract does not specify whether the spaces were to be at the Redwood Road or Mountain View Mausoleum.

not in record

Nordin showed the Schoneys a drawing that laid out the crypt locations in the mausoleum. (George Schoney depo p. 10.) George and Erma selected two specific crypts located "at eye level". (Id. at 10,11). George Schoney testified that the mausoleum space he purchased was "the Memorial Estates in the east side" (Id. at 19) commonly known as the Mountain View location (Id. at 20). See also George Schoney depo. p. 21, 22 "[the family] didn't want to be buried over there on the west side anyway. . ." Erma Schoney depo. p. 4-5, 9) Nordin represented that a chapel had been started at the Mountain View location (Id. at 22). He further stated that the Schoneys would have access to the Mountain View chapel and be able to have funeral services at the chapel. (Id. at 22).

Nordin promised that the Schoneys would have use of the chapel at no charge (Erma Schoney depo. p. 8). He also

not in record

stated that the money from the Schoney's purchase would be specifically used for construction of the mausoleum. (Id.) Paul Moore, former general sales manager for defendant from 1960-1966, and a sales representative from 1972-1974 (Moore depo. p. 4, 5) confirmed that it was his understanding that the money would be used for building the mausoleum. (Id. at 9, 14, 15).

During Nordin's presentation, he showed the Schoneys pictures of the chapel and proposed mausoleum at Mountain View. (George Schoney depo. p. 9). Moore agreed that it was a standard policy to show an artists drawing of what the mausoleum would look like. (Moore depo. p 22, 23). The drawing was identified as Exhibit 1 to the Moore deposition.

Several months after the Schoneys had purchased pre-need spaces at Mountain View, Erma's father (Clint Wheeler) died. (Erma Schoney depo. p. 9). It had always been the intent of the Schoneys and Erma's parents to be interred together at Mountain View. (Affidavit of Erma Schoney, 1/5/88 para. 1, 2). Because the Mountain View mausoleum was not built, Erma had no choice but to have her father buried in the ground as a temporary arrangement. (Erma Schoney depo. p. 9). This temporary ground burial was induced by defendant's promise that "he [Erma's father] would only be there [i.e. in the ground] about six months." (Id.) (See also George Schoney depo. p. 41 "he would be moved in six months.") Erma and her family were "strongly opposed to ground burial" for personal reasons. (Erma Schoney affidavit, para. 5; Erma Schoney depo. p. 18.) Because the

Schoneys were assured that Clinton Wheeler's ground burial was only temporary, no marker was placed on his grave. (Affidavit of Erma Schoney, para. 5).

After Clinton Wheeler's burial in 1974, Erma and her mother went to the Mountain View cemetery "lots of times" to "see if they were building it [i.e. the mausoleum]." (Erma Schoney depo. p. 11). Erma was "very concerned" about it and "worried". (Id.) Erma asked the defendant when the mausoleum was to be built. (Id.) George also testified that he went "once a year" to see about the building of the mausoleum (George Schoney depo. p. 40). Defendant "told George that it would be started in the near future; this went on for 8 years. (Id. at 42).

Eventually, George was told that "there wasn't enough people interested at the present time for them to build a mausoleum." (Id. at 48-49). George got the impression that "they would never build it." (Id.). It was in 1981 that George decided defendant wasn't going to build a mausoleum, and so he and Erma and Mrs. Wheeler purchased alternate spaces at Sunset Lawn mausoleum. (Id. at p. 43, 45). The Schoneys alleged that this was on or before March 29, 1981. (Second Amended Complaint, para. 11).

During the passing years, defendant failed to keep track of the unmarked grave of Clinton Wheeler. (Affidavit of Erma Schoney, para. 7). Erma and defendant disagreed as to where Wheeler was buried. (Erma Schoney depo. p. 16). As a result, defendant's agent "had to use a long metal probe to locate the

casket." (Affidavit of Erma Schoney, para. 7; Erma Schoney depo. p. 16). Erma averred that "to disturb his grave in this manner was very distressful to us." (Id.).

Sometime prior to about 1977, the cemetery chapel at Mountain View was completed. The Schoneys alleged that the cemetery chapel was rented as office space. (Fifth Amended Complaint, para. 31). This was conceded in Mr. Holt's deposition where he stated that the salesmen "know that the area of the building that will eventually house the pews and the whole operation is currently office space..." (Holt depo. p. 42; R. 1399). Defendant instead substituted use of L.D.S. chapels which were provided to defendant free of charge. (Id. at p. 44). The chapel was rented to defendant's previous company, Security National Life Insurance Co. (Quist depo. Ex. 1 and 2). The total proceeds received by defendant from renting the cemetery chapel is at least $200,000. (Quist depo. exhibits 3-11).

After the Schoneys decided that defendant was not going to build a mausoleum at Mountain View in the foreseeable future, they purchased substitute mausoleum spaces in an existing mausoleum at Sunset Lawn. (Erma Schoney depo. p. 12). Erma averred that:

> Before my mother died, we asked Memorial Estates to release my father's body so it would be placed next to his wife at Sunset Lawn when she died. Memorial Estates refused. Finally, on the morning of my mother's funeral, they released his body. This was severely distressing and upsetting to us, to be faced with the inability to lay my parents to rest together. Even more upsetting was the fact that my mother never

knew she would be able to be interred with her husband.

(Affidavit of Erma Schoney, paragraph 8.) George testified that "right up until the night before the funeral, we didn't know but what we were going to have him in one place and her in another place. . ." (Id.). George confirmed that Erma "spent a lot of nights worrying about it . . . it caused a lot of grief." (George Schoney depo. p. 47-48).

George stated that he "still had the nightmare, until we found another place [i.e. Sunset Lawn] that I could be there any time, the same way." (Id. at 46).

When defendant finally relented and allowed Mr. Wheeler to be disinterred and transferred to Sunset Lawn, the Schoneys learned that there had been water damage to Mr. Wheeler's casket due to what appeared to be poor materials used. (George Schoney depo. p. 47).

PROCEDURAL HISTORY

Class Certification:

The Schoneys brought their claims individually and on behalf of a class of pre-need consumers of defendant's services. On February 10, 1983, the action was certified as a class action by Judge Fishler. (R. 202). The class was defined as "all those persons who have signed a standard form agreement for the purchase of mausoleum space from the defendant." (R. 294). On February 10, 1984, defendant moved to have the class decertified. (R. 487). On June 24, 1985, Judge Dee entered an order

decertifying the class. (R. 704). Judge Dee refused to enter findings of fact and conclusions of law in support of the decertification order. (R. 681). Plaintiffs successfully obtained a writ of mandamus requiring Judge Dee to enter findings of fact and conclusions of law to support decertification. (R. 998). Judge Dee's findings and conclusions were entered on December 4, 1985. (R. 1053).

Discovery:

Plaintiffs served interrogatories on defendant on June 17, 1982. (R. 12). Defendant answered the interrogatories on August 27,1982, approximately 26 days late. (R. 50). Plaintiff submitted to defendant a second request for documents on January 28, 1983. (R> 197). No answer has ever been filed. The Schoneys submitted a third request for documents on March 1,1983. (R. 225). No response has ever been filed.

Defendant submitted a second set of interrogatories on July 11, 1983, to the Schoneys. (R. 328A). They timely responded 30 days later on August 11, 1983. (R. 356).

The initial round of discovery was completed by August 11, 1983. No further discovery was conducted until June 12, 1987, when plaintiffs submitted further interrogatories and another request for documents. Defendant sought and received an extension of time until September 15, 1987, to answer discovery. (R. 1121). A discovery cut-off was imposed of December 8, 1987, and a trial date of December 7, 1988 set. (R. 1136). Defendant did not answer by September 15. Finally, on October 28, 1987,

the Schoneys' counsel sent a letter reminding defendant of its discovery obligation and delay. (R. 1164). Defendant partially answered plaintiff's discovery by mailing interrogatory answers on November 24, 1987. (R. 1166). This was 13 days before discovery cut-off. Plaintiff was forced to bring a motion to compel further answers on December 8, 1987. (R. 1150). This motion was granted, in part, by order entered December 23, 1987. The Schoneys also requested more time to do follow-up discovery because of defendant's late and incomplete answers. This request was denied. (R. 1187).

Meanwhile, defendant sent discovery to plaintiffs on June 26, 1987. Plaintiffs' answers were filed (without objection from defendant) on August 13, 1987. Defendant claims to have sent a final set of interrogatories and requests for documents to plaintiffs' counsel on April 29, 1988. These were answered on June 20, 1988. Because the answers were 18 days late, Judge Moffat struck plaintiffs' complaint and entered default judgment against them.

Trial Settings:

Plaintiff first certified the case for trial on May 3, 1983. (R. 263). Defendant objected. (R. 269). Plaintiff again certified the case on September 13, 1983. (R. 390). Upon Judge Leary's poor health, plaintiff moved for a new trial judge to avoid delay. (R. 522).

Plaintiffs certified the case as ready for trial on April 22, 1986. (R. 1067). By scheduling order of September 22,

1986, the case was given a first place trial setting on February 9, 1987. (R. 1069). However, Judge Dee suddenly retired effective January 31, 1987. Plaintiff requested a special pro tempore judge to prevent delay of a trial. (R. 1085). This was denied. By scheduling order of May 14, 1987, the case was given a trial date of August 24, 1987. (R. 1096). Upon defendant's request for a continuance, the trial date was changed to December 7, 1987. (R. 1136). This was again changed to February 1, 1988 upon defendant's request. (R. 1139). Upon the court's own motion, the trial was continued. (R. 1301). Upon plaintiff's request (R. 1336 and 1338), the case was reset for trial on July 6, 1988. (R. 1360).

Summary Judgment:

On February 10, 1984, defendant moved for summary judgment as to all causes of action in plaintiffs' Second Amended Complaint. (R. 494). On June 24, 1985, Judge Dee entered an order denying defendant's motion. (R. 693). Defendant filed a second motion for summary judgment as to all causes in this complaint on December 29, 1987.(R. 1200). This motion was in all material respects the same as the February 10, 1987 motion. This second motion was denied by Judge Moffat on January, 1988. (R. 1301). Defendant filed a third motion for summary judgment on June 14, 1988. (R. 1363). This motion was granted by Judge Moffat as to all causes in plaintiffs' complaint on June 27, 1988. (R. 1377).

POINT I

DEFENDANT SHOULD HAVE BEEN REQUIRED TO PLACE 75% OF THE SCHONEY'S PAYMENTS IN TRUST UNDER U.C.A. 22-4-1

A. Claim for Breach of Trust - 22-4-1.

Utah Code Ann. §22-4-1 required defendant to maintain 75% of the money paid by pre-need plaintiffs in a trust. The statute at the time of plaintiffs' purchase applied when "money is paid for a purpose of finishing or performing funeral services or the furnishing or delivery of any personal property, merchandise, or services of any nature to be conveyed or delivered at any time. . . for future use at a time determinable by the death of the person ...". §22-4-1. The act excludes "cemetery lots, vaults, mausoleum crypts, niches, cemetery burial privileges, and cemetery space..." (Emphasis added). Plaintiff claimed that the exclusion for "mausoleum crypts" did not extend to unconstructed mausoleum crypts.

The legislature amended §22-4-1 in 1983 to include:

> personal property, merchandise, or services of any nature to be conveyed or delivered at any time ... including ...unconstructed mausoleum crypts..."

B. §22-4-1 (1971) Required a 75% Trust.

Pre-need sales have been so flagrantly abused in the cemetery business, that over half the states have enacted pre-need laws. These laws require that money paid under a pre-need cemetery contract be held in trust. The case of Utah Funeral Directors v. Memorial Gardens of the Valley, 408 P.2d 190, 17 Utah 2d 227 (1965), explains the purpose of these statutes:

> One of the main purposes of the pre-need laws is to make sure that after the solicitations of such contracts, the embalming and funeral services will be furnished as contracted to the extent that the trust funds and earnings can accomplish this. 17 Utah 2d at 232.

State v. Anderson, 408 P.2d 864 (Kan. 1965) added:

> [Because of] a great time lag between the time of beginning and performance . . . there is a public interest in the protection of funds intended for a particular purpose, from whatever hazard, whether the normal vicissitudes of business, or plain fraud and deceit.

The statute as originally written in 1971 shows from its face that it meant to cover pre-need arrangements. The title refers to trusts for "pre-arranged funeral plans," and indicated a broad reading of that phrase to include "any agreement" to provide property and services in the future at the time of death. The sale of pre-need mausoleum space fits this intention. The exceptions list what are normally understood to be existing property and services. This would not include pre-need mausoleum spaces. The purpose of protecting pre-need consumers would be frustrated by a reading excluding pre-need mausoleum sales from the trust protection.

Defendant's claim was that it was selling "mausoleum crypts." However, defendant did not sell a mausoleum crypt. It sold the right to the use of a non-existent piece of personal property at a time determined by the plaintiff's death. Defendant sold a promise to build a crypt (services) to be performed in the future. Thus, the 75% trust exemption for "mausoleum crypts" should not apply.

C. If 22-4-1 (1971) Was Unclear, Then The 1983 Revision Should Apply Retroactively.

The 1983 legislature made explicit that the 75% trust applied to unconstructed mausoleum crypts. The Utah Supreme Court has held "when the purpose of an amendment is to clarify the meaning of an earlier enactment, the amendment may be applied retroactively in pending actions." State, Dept. of Soc. Services v. Higgs, 656 P.2d 998, 1001 (Utah 1982) ..." Shelter America Corp. v. Ohio Cas. & Ins. Co., 745 P.2d 843, 845 (Utah App. 1987). The 1971 version was at least unclear whether the 75% trust applied to pre-need unconstructed mausoleum crypts. The 1983 amendments made clear the intent of the prior enactment, and the amendment should apply in pending actions such as this one.

Further, since the operation of a cemetery is impressed with a public purpose, any contract implicitly includes a clause rendering the contract subject to any changes made in the laws. Diamant v. Mnt. Pleasant Westchester Cemetery Corp., 201 N.Y.S. 2d 861 (Sup. 1960); Grove Hill Realty Co. v. Fercliff Ass'n., 198 N.Y.S. 2d 287 (A.D. 1960). Silver Mtn. Cem. Ass'n v. Simon, 231 N.Y.S. 2d 909 (Sup. Ct. 1962). Similarly, each contract has an implied term that the performance of the contract will comply with any applicable law. Hall v. Warren, 632 P.2d 848 (Utah 1980). Thus, the Schoneys are entitled, at a minimum, to interest on 75% of her contract payments from 1983 to the present.

POINT 2

THERE WAS AMPLE EVIDENCE THAT DEFENDANT HAD BREACHED THE SCHONEYS' CONTRACT BY DELAYING CONSTRUCTION OF THE MOUNTAIN VIEW MAUSOLEUM

A. Claim for Delay in Construction.

Plaintiffs claimed defendant was obligated to build a mausoleum at Mountain View "within one year from the date that the Public Relations Development Program on that unit is completed." (Mausoleum Sales Agreement, para. headed "Design and Construction;" Fifth Amended Complaint, para. 2.) It was conceded by defendants that the Public Relation Development Program is completed upon sale of 1/2 of the spaces in the mausoleum. (Tr. at p. 22-24). Plaintiff claimed that defendants delayed the actual completion of the Public Relations Development Program by voluntarily abandoning sales of the mausoleum spaces. (Fifth Amended Complaint, para. 3-5).

B. Defendant's Obligation to Build a Mausoleum Began one Year After it Stopped Selling Mausoleum Spaces at Mountain View.

The completion of the Public Relations Development Program was a condition precedent to defendant's performance. Kimball v. Campbell, 699 P.2d 714 (Utah 1985). Because the fulfillment of the conditions was dependent on defendant's acts (i.e. sales of mausoleum spaces), it was required to make a good-faith effort to complete the conditions. Connor v. Stevens School of Business, 560 P.2d 1383 (Utah 1977). When a good faith effort is not made, the condition is deemed fulfilled. Connor, supra. Thus, defendant's obligation to build began one year from the time it failed to make a good-faith effort to fulfill the conditions by selling 1/2 of the spaces.

As early as 1975, defendants had abandoned its active efforts to fulfill the conditions by selling pre-need mausoleum spaces. (Keith Hughes depo., p. 35). A jury could have reasonably found that a good-faith effort to fulfill the condition would require at the least an active continuing effort to sell 1/2 of the spaces. Defendants put no evidence in the record that their abandonment was beyond their control. A jury could have concluded that defendant's obligation to build was triggered when efforts to sell 1/2 the spaces were stopped.

Defendant also contended that plaintiff bought space at Redwood Road and that because a mausoleum was built in 1976, there was no breach. (Tr. at p. 13). However, the Schoneys alleged that they bought mausoleum space at Mountain View. This was supported by the affidavit or Erma Schoney and deposition testimony of both Erma and George Schoney. Because the evidence was conflicting as to whether plaintiffs bought at Mountain View or Redwood, the trial court erred by granting summary judgment on the basis that a mausoleum was timely built at Redwood Road.

POINT 3

THE SCHONEYS CLAIM THAT DEFENDANT FAILED TO BUILD THE MAUSOLEUM AS PROMISED SHOULD BE SENT TO A JURY.

A. Claim for Breach of Warranty.

Plaintiff claimed she was shown a drawing of the mausoleum intended for Mountain View. (Fifth Amended Complaint, para 8.) She alleged that the mausoleum as built was different,

and of inferior quality. The Mountain View mausoleum was built in 1985. (Answer to Interrogatory 5, November 24, 1987).

B. The Statute of Limitations Began to Run When the Mountain View Mausoleum Was Built in 1985.

Defendant contended that plaintiff had bought space at Redwood and, therefore, the wrong, if any, began upon completion of the 1976 Redwood mausoleum. (Tr. at p. 18). Of course, the Schoneys' testimony was always that they bought at Mountain View. Thus, the statute of limitations began to run in 1985 when the Mountain View mausoleum was constructed. Defendant made no claim that plaintiff's claim for breach of warranty was untimely if it related to the Mountain View mausoleum.

C. There was No Evidence in the Record that the Mountain View Mausoleum (As Built) was the Same as the Mausoleum Shown to Plaintiffs.

There was no evidence in the record that the Mountain View mausoleum looked like the drawing shown to the plaintiffs in 1973. Defendant's counsel opined that "the two mausoleums are substantially the same." (Tr. p. 17). However, Moore stated at his deposition that the mausoleum as shown, and the mausoleum as built, were "absolutely" not the same. (Moore depo. p. 24). Moore stated the constructed one was "inferior" and an "eyesore." (Id. at 24-25). A jury might or might not share that opinion. Because the trial court had no basis to decide whether the mausoleum was built as represented, summary judgment was inappropriate.

POINT 4

WHETHER THE CHAPEL WAS AVAILABLE FOR THE SCHONEYS TO USE WAS AN ISSUE OF FACT PRECLUDING SUMMARY JUDGMENT.

A. The Schoneys' Claim for Wrongful Rental of the Cemetery Chapel.

The Schoneys alleged that defendant rented out the cemetery chapel from 1977 to 1984 as office space. (Fifth Amended Complaint, para 31.) The Schoneys sought an order requiring a restitution of the chapel rental proceeds to the owners of cemetery plots and mausoleum spaces who were entitled to use of the chapel.. (Id. at p. 18).

B. There was no Factual Basis for This Court to Conclude that the Chapel was not Rented out and Unavailable for Funeral Services.

There was no evidence in the record that the chapel was not rented to Security National Life. Instead, the evidence in the record shows that salesmen for defendant were told "the area that will eventually house the pews and the whole operation is currently office space." (Holt depo. p. 42). Further, if the chapel was not being rented and was available, why would defendant substitute use of LDS chapels for funerals? (Id. at 44). The only basis the court had to support defendant's motion was defendant's counsel's statement that there was an uncontroverted affidavit that there was a chapel available at Mountain View. (Tr. at 19, 51). There is no such affidavit. The trial court was unaware of such a basis (Tr. at p. 48). The Schoney's counsel specifically represented to the trial court that the chapel was not available because there was an insurance company in there. (Tr. at p. 47).

The reason that there was next-to-nothing in the record as to whether the Mountain View chapel was available is because that claim was first made at oral argument. The Schoneys had, in fact, made a formal request for entry onto land for the express purpose of taking photographs of the chapel filled with desks, filing cabinets, and etc. Had either counsel or the court known of that basis for defendant's motion, an evidentiary record could have been made. As it was, all the trial court had was the assertion of defendant's counsel that a chapel was available, and the assertion of the Schoney's counsel that the chapel was not available. Such is not the stuff of which summary judgments can be made.

C. The Schoneys Could Sue to Redress a Past Use of the Cemetery Chapel for Non-Cemetery Purposes.

A cemetery may not be put to any use inconsistent with repose of the dead. Vidrine v. Vidrine, 225 So. 2d 6691 (La. App. 969); Michels v. Crouch, 122 S.W.2d 211 (Tex. Civ. App. 1938);Wing v. Forest Lawn Cemetery Assn, 101 P.2d 1099 (Cal. 1940); Benson v. Lakewood Cemetery, 267 N.W. 510 (Minn. 1936); Moore v. U.S. Cremation Co., 9 N.E.2d 795 (N.Y.); Hertle v. Riddell, 106 S.W. 282 (Ken. 1907); Frank v. Cloverleaf Park Assn, 148 A.2d 488 (N.J. 1959); Connolly v. Frobeniurs, 574 P.2d 971 (Kan. App. 1978); Arlington Cem. Co. v. Hoffman, 119 S.E. 696 (Ga. 1961). This prohibition is grounded in the idea that cemetery management are trustees. See e.g. Dennis v. Glenwood Cemetery, 130 A. 373 (N.J. 1924); Braun v. Maplewood Cemetery Ass'n, 89 N.W. 872 (Minn. 1902); Hines v. State, 149 S.W. 1058

(Tenn. 1911); Cave Hill Cemetery v. Gosnell, 161 S.W. 980 (Ky. App. 1913).

Use of the cemetery chapel for insurance offices is a flagrant abuse of the interests and rights of the consumers who have purchased cemetery lots and mausoleum spaces. A court of equity should be available to redress such an abuse.

POINT 5

THE TRIAL COURT COULD NOT CONCLUDE AS A MATTER OF LAW THAT NO FRAUD HAD BEEN PRACTICED ON THE SCHONEYS.

A. The Schoneys' Claim for Fraud:

The Schoneys alleged that defendant had represented that the Schoneys had purchased specific mausoleum spaces. (Fifth Amended Complaint, para 18). This allegation was supported by the deposition testimony of the Schoneys' that they selected specific mausoleum spaces when Nordin made the sale to them. (George Schoney depo. p. 10-11). Moore's testimony also confirmed that specific spaces were sold.

The reality is that defendant sold many more mausoleum spaces than it actually had. (Fifth Amended Complaint, para. 17, 19). This fact was not explained to the Schoneys. (Id. at para. 19). Actually, defendant stopped assigning specific crypt spaces in 1973 or 1974 (Smith depo. p. 37). This was about the time the Schoneys purchased. Thus, the specific mauscleum spaces people (like the Schoneys) thought they were buying were non-existent.

Defendant's argument to the trial court was that the Schoneys had "not alleged" there was never a crypt available to them. (Tr. at p. 31). Defendant's intent was to substitute a crypt space at Redwood Road. Of course, the Schoneys did not want "any" crypt; they had purchased a specific crypt space at a specific location (Mountain View). The fact that defendant could have substituted a different crypt in a different location merely points up the fraud. The tactic is a kind of bait and switch; consumers think they're getting one thing, but another is substituted. The trial court erred by concluding as a matter of law that the Schoneys could not prove fraud.

POINT 6

THE SCHONEYS' CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WAS NOT TIME-BARRED.

A. The Schoneys' Claim for Intentional Infliction of Emotional Distress.

The Schoneys pleaded a claim for intentional infliction of emotional distress in their Second Amended Complaint filed June 6, 1983 (Count 10). They repleaded this theory in their Fifth Amended Complaint of January 26, 1988.

B. The Statute of Limitations.

Defendants' ground for dismissing the count for intentional infliction of emotional distress was "the statute of limitations on that claim has run." (Tr. at p. 25). No claim was made that facts alleged did not state a cause of action. Defendant claimed that the relation back provision of Rule 15(a)

did not apply because the wrong or liability alleged in the Fifth Amended complaint was different from that in the second Amended Complaint, and it required different proof. Defendant calculated the four-year limitation period from May 22, 1982. (Tr. at p. 49).

C. Legal Standard and Standard of Appellate Review.

If the intentional infliction count alleged in the Fifth Amended Complaint "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the [Second Amended Complaint], the amendment relates back . . . ". Rule 15(c). Since the question is answered solely by comparing the two pleadings, the appellate court simply reviews for error.

D. The Schoneys' Claim for Intentional Infliction of Emotional Distress in the Fifth Amended Complaint Relates Back Under Rule 15(c) to the Claim for Intentional Infliction in the Second Amended Complaint.

Defendant's counsel represented that the Schoneys' claim for intentional infliction of emotional distress in the Fifth Amended Complaint was a new cause of action brought up for the first time. (Tr. p. 25). Actually, the Schoneys pleaded a separate claim for intentional infliction of emotional distress in the Second Amended Complaint of June 6, 1983, just over one year from the culmination of the entire transaction between the named parties. (Second Amended Complaint, para. 53). Under Rule 15(c), the claim for intentional infliction in the Fifth Amended Complaint related back to at least the Second Amended Complaint.

The following allegations in the Fifth Amended Complaint show substantial similarity with those in the Second

Amended Complaint. Included are citations to the April 1, 1983 depositions of the Schoneys for the facts more specifically alleged in the Fifth Amended Complaint. Defendant was on notice of these facts since at least that time. The allegations which are bracketed were taken from the Second Amended Complaint:

> [Defendant's advertising program is designed to promise customers a sense of peace, comfort and security through the purchase of "pre-need" mausoleum space and related services. Plaintiffs have paid money in good faith. However, defendants have failed to provide peace, comfort, and security.] (Verbatim, Second Amended Complaint, para. 53.)
>
> Defendant's knew, or should have known, that named plaintiffs were opposed to ground burial for philosophical and personal reasons. (Erma Schoney depo. p. 18, April , 1983).
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> [Plaintiffs agreed to a ground burial for Clinton Wheeler in 1974 in reliance on defendant's express promise that he would not be there more than several (less than six) months.] (George Schoney depo. p. 16). (cf. Second Amended Complaint, para. 14, regarding defendant's scheme to substitute cheaper ground plots.)
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> Further, because of the temporary nature of the interment, his grave was not marked. (Erma Schoney depo. p.16)
>
> [However, defendants intentionally or recklessly delayed building the mausoleum for years.] (cf 2d. Complaint, para. 12, 13, 20, 43-48.)
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> Moreover, with the passage of time, defendants lost track of the location. (Erma Schoney depo. p. 16). Ultimately, defendants were forced to use a long metal probe to locate the grave. (Id. at 11.)
>
> [Due to the long delay, and defendants' stated intention not to build the mausoleum, plaintiffs' purchased other mausoleum space

> at Sunset Lawn.] (Id. at 11-12) (Second Amended Complaint, para 11).
>
> When plaintiff Erma Schoney's mother died, she was interred at the Sunset Lawn. Defendants intentionally refused to allow the father of plaintiff Erma Schoney to be disinterred, and reinterred at Sunset Lawn with his wife. (George Schoney depo. p. 45-46.) Finally on the morning of the funeral, defendants relented and allowed plaintiff Erma Schoney's father to be transferred. (Id. at 47-48).
>
> [Defendants' conduct, together with the acts alleged above, has caused great turmoil and severe emotional distress to the named plaintiffs. Defendants' conduct was done wilfully and in reckless disregard for their rights and sensibilities.] (Second Amended Complaint, para. 53.)
>
> A reasonable person should have known that defendants' conduct would cause such severe emotional distress. (New allegations).

Thus, the allegations in the Fifth Amended Complaint are nothing more than a compilation of allegations from the Second Amended Complaint, as more particularly set forth in the Schoneys' depositions of April 1, 1983.

POINT 7

> BECAUSE DEFENDANT FAILED TO PROPERLY SERVE A FORMAL SUGGESTION OF DEATH, THE ACTION WAS IMPROPERLY DISMISSED AS TO GEORGE SCHONEY'S ESTATE.

A. Defendant's Motion to Dismiss.

Defendant made an oral motion to dismiss the action as to George Schoney, pursuant to U.R.C.P. 25. (Tr. at p. 8). Defendant represented that a suggestion of death upon the record had been made more than 90 days before the hearing. (Tr. at. 0.11). Defendant was referring to a statement in its motion for

summary judgment filed on December 29, 1987. (Id.). That motion, however, did not mention Rule 25, nor argue George Schoney's death as a basis for dismissal.

B. No Proper Suggestion of Death Was Ever Made.

A suggestion of death upon the record is a formal pleading. See e.g. Fed. R. Civ. P. Form 30. A passing reference somewhere in the record to death of a party is insufficient. In Blair v. Beech Aircraft Corp., 104 F.R.D. 21 (W.D. Pa. 984) a reference to death of a party was made in a pleading. The court stated:

> This Court does not agree that the reference to plaintiff's death in the November 4, 1983 pleading triggered the running of the 90 day time limit. Under Rule 25(a), the time for filing a motion for substitution commences only after the death of the party is formally suggested on the record by the filing and service of a written statement of the fact of death as provided in Rule 5 of the Federal Rules of Civil Procedure and Form 30. United States v. Miller Bros. Constr. Co., 505 F.2d 1031, 1034 (10th Cir. 1974); Mobil Oil Corp. v. Lefkowitz, 454 F. Supp. 59, 70 (S.D.N.Y. 1977). No such formal writing was filed in the instant case. The reference to the death of the plaintiff in the pleadings is not sufficient to trigger the running of the 90 day time period.

Likewise, in Dolgow v. Anderson, 45 F.R.D. 470 (E.D.N.Y. 1968), the court held:

> A statement made in passing during a deposition is not "a statement of the fact of death: within the meaning of Rule 25. See Official Form 30 Federal Rules of Civil Procedure. Substitution may be made prior to service of the statement. 4 Moore's Federal Practice 25.-02, p. 62 (1967 Supp.).

> Attorneys are sometimes so harassed during the course of a litigation that they may well overlook an informal suggestion of death. When the consequences to the client of a slightly delayed reaction may be severe and the burden of providing formal notice is slight, insistence on the observance of procedural ritual is justified.

Similarly, an answer to interrogatory is not a proper suggestion of death:

> The incidental mention of the deaths in answers to interrogatories does not appear to this Court to have started the 90-day period running. Federal Form 30 provides an example of the proper suggestion; the answers to interrogatories cited by defendants do not rise to the required level of formality.

Acri v. Int. Ass'n of Mach. & Aero. Wkrs., 595 F.Supp 326, 330 (N.D. Cal. 1983).

No proper suggestion of death was ever made. A passing reference to death in an unrelated motion is insufficient. An answer to interrogatory is insufficient. The rules contemplate a formal pleading specifically referring to the provisions of Rule 25. See Connelly v. Rathjen, 547 P.2d 1336 (Utah 976) where dismissal was proper because "notice of death was duly made of record pursuant to Rule 25(a), U.R.C.P."; Nat. Equip. Rental Ltd. v. Whitecraft Unl. Inc., 75 F.R.D. 507 (E.D.N.Y.1977)(service of notice to file claim against estate is not proper suggestion of death).

C. No Personal Service Was Made Pursuant to Rule 25.

Rule 25(a)(1) requires service of the suggestion of death to be made "upon persons not parties in the manner provided in Rule 4 for the service of a summons." Rule 4, in turn,

requires personal service upon the executor or personal representative of the estate of George Schoney. Rule 4(e)(1). "The non-parties for whom Rules 25(a)(1) and 4(d)(1) mandate personal service are evidently the `successors or representatives of the deceased party'." Fariss v. Lynchburg Foundry, 769 F.2d 958, 962 (4 Cir. 1985). Defendant offered no evidence that it had served the non-party, i.e. the estate of George Schoney. Defendant offered no evidence that an executor or personal representative had ever been appointed for George Schoney's estate.

Service upon George Schoney's counsel was not sufficient.

> Service on decedent's attorney above was inadequate. The attorney's agency to act ceases with the death of his client, see Restatement (Second) of Agency __120(1)(1958) and he has no power to continue or terminate an action on his own initiative. Because the attorney is neither a party nor a legal successor or representative of the estate, he has no authority to move for substitution under Rule 25(a)(1), as the courts have repeatedly recognized." Fariss v. Lunchburg Foundry, supra, 769 F.2d at 962.

Also holding that the deceased's attorney "is not a representative of the deceased party in the sense contemplated by Rule 25(a)(1)" is Rende v. Kay, 415 F.2d 983 (D.C. Cir. 1969). See also Brown v. Mustain, 30 Fed. Rules Serv. 2d 534 (4 Cir. 1980)(decedent's attorney not a party or successor to party who can file suggestion of death); Al-Jurdi v. Rochefelbs, 88 F.R.D. 244 (W.D.N.Y.1980)(service must be made on estate unless estate's attorney agrees and is authorized to accept service of process.) Because George Schoney's attorney does not automatically

represent his estate, defendant has never properly served George Schoney's estate.

POINT 8

DEFENDANT'S OFFER OF JUDGMENT DID NOT MOOT THE SCHONEY'S CLAIMS

A. The Trial Court Dismissed All the Schoney's Claims Because Defendant Offered to Rescind the Contract and Pay Restitution in the Amount of the Purchase Price Plus Interest.

Defendant made an oral offer of judgment at the summary judgment hearing (Tr. at p. 13). The amount was $4,000 and was calculated by returning the money paid by the Schoney's plus interest. (Tr. at p. 19). Defendant seemed to argue that return of the money the Schoneys paid, plus interest, would "moot" all their damage claims. (Id.). The trial court apparently agreed and held that the Schoneys could never recover more than the $4,000 offered. (Tr. at p. 51).

B. The Schoneys Did Not Seek Rescission and Restitution; Instead They Sought to Affirm the Contract and Recover Damages.

The Schoney's Fifth Amended Complaint never sought recision and a refund of the money they had paid. Instead, they sought interest on the money they paid (damages for delay in building the Mountain View Mausoleum); the difference in value between the mausoleum as shown and the mausoleum as built (damages) and their share of the money earned by defendant in renting the cemetery chapel (damages for loss of use). Additionally, the Schoney's sought an accounting of trust funds, which does not depend on a finding of breach of contract. The Schoneys also sought damages for buying substitute mausoleum spaces

("cover" damages) and damages for their mental and emotional distress. Every remedy sought (except the trust accounting) was based on damages for breach of contract or tort. The Schoneys made no request for rescission of the contract.

C. Election of Remedies Is Up to the Schoneys, Not Defendant and the Trial Court.

By offering rescission, defendant attempted to force an election of remedies on the Schoneys. Obviously, defendant feels it is cheaper to give the Schoneys their money back than to account for building an inferior mausoleum, renting out the cemetery chapel, abusing trust funds and obligations, and for mental distress caused by the lengthy delay in building the mausoleum. However, defendants are not allowed the option of choosing the least expensive remedy. If a plaintiff's damages exceed the purchase price, the plaintiff is free to seek damages.

A plaintiff is entitled to an election of remedies "free of fraud or imposition." Angelos v. First Interstate Bank of Utah, 571 P.2d 772, 778 (Utah 1983).

> It is axiomatic that where a civil wrong gives rise to two or more causes of action, the choice of remedy is vested in the victim, not in the wrongdoer . . . It does not lie in the mouth of the wrongdoer to demand that his victim be limited to that cause of action which is most beneficial to the wrong-doer.

Gherman v. Colburn, 140 Cal. Rptr. 330, 343 (App. Ct. 1977) (Emphasis in the original.)

> The choice of remedies belongs to the one who has been defrauded and may not be forced upon him by the wrongdoer.

Moore & Co. v. Williams, 657 P.2d 984, 988 (Colo App. 1982). See also Mills v. Brown, 568 S.W.2d 100 (Tenn. 1978) (purchaser's choice whether to seek rescission or damages; not up to vendor); King v. Lindlay, 697 S.W. 2d 749 (Tex. App. 1985) ("Defendant may not dictate to a plaintiff which remedy he should pursue").

D. There was No Evidence that the Schoney's Damages Could Not Exceed $4,000.

There was no basis for the trial court to conclude as a matter of law that the damages alleged would not exceed $4,000. Damages such as mental and emotional distress are not capable of ascertainment on summary judgment anyway, and must be left to a jury. Thus, defendant's offer of settlement was no basis for dismissing the Schoney's complaint.

A procedure similar to that of Judge Moffat's was found reversible error in Jarrett v. G.L. Harper & Sons, Inc., 235 S.E. 2d 362 (W. Va. 1977). After picking a jury, the defendant confessed judgment in the amount of the plaintiff's out-of-pocket expenses. After colloquy with plaintiff's counsel, the trial court dismissed the case. The appellate court reversed:

> The record discloses no explanation about how the trial court arrived at his decision to force acceptance of this confession of judgment upon plaintiffs. . . [W]hen a defendant's offer of judgment only partially satisfies the plaintiff's claim for damages and plaintiff either rejects the tender or accepts it as part payment only, the court must consider the offer withdrawn and submit the case to the jury, whereas here one has been demanded.

Id. at 363, 364.

Because the offer of judgment was only a partial satisfaction and was rejected by the Schoneys, the trial court had no choice but to send the matter to a jury.

E. The Schoneys' Complaint Should Not Have Been Discussed Even if their Damages Could Not Exceed $4,000.

Assuming for sake of argument that the Schoneys' damages could not exceed $4,000, defendant's offer of judgment could not form the basis for dismissing their complaint. The dismissal deprived the Schoneys of both their cause of action and the $4,000 which defendant offered. An offer of judgment "is neither a defense to an action nor a bar to further prosecution of a suit." Katz Drug Co. v. Comm. Standard Ins., 647 S.W.2d 831, 840 (Mo. App. 1983). "Defendant's reliance upon its offer of judgment as constituting an acceptable basis for the grant of summary judgment is misplaced. [It] is not a defense to an action and does not bar the further prosecution of a suit. [Citation omitted]. Miller v United Security Ins. Co., 496 S.W. 2d 871, 876 (Mo. App. 1973). An offer of judgment is not a pleading, deposition, admission or affidavit which will support summary judgment. Id.

What Judge Moffat did must be distinguished from the procedure occasionally used in class actions of offering judgment in excess of the named plaintiff's damages. This is done after class certification is denied and is done to avoid a useless trial. In those cases, the named plaintiff gets a judgment in his favor for the full amount of his individual damages. Even then, a court may not impose upon a plaintiff a settlement that

deprives him of relief to which he could be entitled after trial. [Citation omitted]." Kline v. Wolf, 702 F.2d 400, 405 (2d Cir. 1983). Part of the relief sought in a class action is class certification. Thus, a judgment in favor of an individual named plaintiff must allow for appeal of the denial of class certification. Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978) affirmed sub. nom. Deposit Guar. Nat. Bank v Roper, 445 U.S. 326, 100 S. Ct. 1166, 63 L. Ed.2d 427 (1980). This prevents a large defendant from avoiding class-wide accountability by paying off the named plaintiff's claims through an unaccepted offer of judgment.

In this case, however, defendant used its unaccepted offer of judgment to avoid both class liability and liability to the Schoneys. This approach deprives the Schoneys of both the offered judgment and their causes of action. No plausible reasoning can support this result.

DATED this 10 day of March, 1989.

DANIEL F. BERTCH[1]

[1]This brief is submitted in its current form pursuant to the order of March 7, 1989. Appellant submits it under protest that the order is incorrect and that the hearing panel will be unfairly hampered by the abbreviated nature of the brief.

CERTIFICATE OF MAILING

I certify that on the 10th day of March, 1989, I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF, (Schoney v. Memorial Estates, et al.) postage prepaid, by depositing a copy of the same in the U.S. Mail to:

Arthur H. Nielsen
Joseph L. Henriod
David Swope
NIELSEN & SENIOR
36 South State, #1100
Salt Lake City, Utah 84111

/jc

Exhibit C

IN THE UTAH COURT OF APPEALS

GEORGE K. SCHONEY and ERMA J. SCHONEY, et al.,	)	BRIEF OF THE RESPONDENTS
Plaintiff/Appellant,	)	
vs.	)	Case No. 880630-CA
MEMORIAL ESTATES, INC., et al.,	)	
Defendants/Respondents.	)	Category No. 14(b)

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,

SALT LAKE COUNTY

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JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Annotated, Sections 78-2-2(3)(j), as amended, and 78-2-2(4), as amended.

NATURE OF PROCEEDINGS

Plaintiff Erma J. Schoney (hereinafter "plaintiff") appeals from the trial court decision granting summary judgment to defendants Memorial Estates, Inc. and Memorial Estates Cemetery Development Corp. ("Memorial Estates") for failure to present in the record sufficient substantive material and relevant evidence to support her causes of action. The trial court found that Memorial Estates did not breach its contract with plaintiff and was in compliance with Utah State statutes, and that plaintiff's other claims were time-barred. Plaintiff further appeals the trial court decision dismissing George K. Schoney from the case for failure to substitute a party after his death was suggested on the record, pursuant to Rule 25 of the Utah Rule of Civil Procedure.

ISSUES PRESENTED

1. The trial court did not abuse its discretion in ruling that plaintiff failed to present in the record substantive material and relevant evidence to support her causes of action and controvert the material and relevant evidence presented by Memorial Estates in its Motion for Summary Judgment.

2. George K. Schoney was properly dismissed as a party plaintiff after more than 90 days had elapsed after his death was suggested on the record.

3. In light of plaintiff's request for an expedited trial setting, the trial court did not abuse its discretion when it struck plaintiff's complaint and entered judgment in favor of Memorial Estates under Rule 37(d) based on plaintiff's failure to respond to discovery:

a) Within 30 days;
b) Before the discovery cut-off;
c) Prior to defendants' motion for sanctions; and,
d) Plaintiff's failure to either request additional time, object or explain the failure to answer.

DETERMINATIVE STATUTES AND RULES

Section 22-4-1, Utah Code Annotated (before 1983 amendment)

Section 78-12-25, Utah Code Annotated, as amended

Rule 25(a), Utah Rules of Civil Procedure

Rule 37(d), Utah Rules of Civil Procedure

Rule 56(e), Utah Rules of Civil Procedure

The above rules and statutes are set out in full in the appendix hereto.

STATEMENT OF THE CASE

Plaintiff has sued Memorial Estates for damages she claims arise out of her purchase of a pre-need contract for space in a mausoleum which was to be built in the future. She claims that Memorial Estates intentionally and fraudulently delayed construction of the now completed mausoleums. She alleges that the buildings do not appear as she believed they would appear when she purchased them. She further claims that the purchase funds were not properly accounted for and held in trust during the period of construction. Finally, she alleges that Memorial Estates wrongfully failed to disinter and move her father's remains when she requested it.

Memorial Estates claims they have either fully performed all duties under the contract, or that they were able to perform had performance been requested. Memorial Estates further asserts that the claim that they failed to disinter Mr. Wheeler is spurious and time-barred.

Plaintiff appealed the determinations by the trial court that: (1) Memorial Estates was entitled to summary judgment on all of the causes of action contained in plaintiff's Fifth Amended Complaint for the reason that there was an absence of evidence to withstand defendants' motion; and, (2) George K. Schoney's dismissal from the action pursuant to Rule 25 of the Utah Rules of Civil Procedure was proper, due to his death and the failure to substitute a party in his stead.

It is defendants' position that the trial court did not abuse its discretion, and (1) plaintiff failed to show sufficient evidence to support her case and withstand the facts and argument supporting the Motion for Summary Judgment; (2) George K. Schoney's death was suggested on the record without substitution and he was accordingly properly dismissed; and, (3) the court acted within its discretion in striking plaintiff's complaint for failure to answer defendants' interrogatories. Plaintiff has not argued that dismissal was improper. Plaintiff has therefore waived any argument to the contrary.

COURSE OF PROCEEDINGS AND DISPOSITION

Plaintiff and George K. Schoney originally filed a complaint on June 17, 1982, alleging:

a) A class action;
b) Tortious bad faith;
c) Breach of contract;
d) Fraud; and,
e) Violation of the Utah Consumer Sales Practices Act. (R. at 2-11)

Memorial Estates filed an Answer denying the allegations in support of each cause of action. (R. at 39-44) Plaintiff and George K. Schoney pursued their discovery from 1982 to 1988. Plaintiff and George K. Schoney amended their complaint June 8, 1983 to allege:

a) Tortious bad faith (failure to complete mausoleum);
b) Breach of contract (failure to complete mausoleum);
c) Fraudulent conveyance;
d) Violation of Utah Consumer Sales Practices Act;
e) Breach of contract to provide chapel;
f) Breach of trust;
g) Breach of statutory trust;
h) Invasion of trust corpus;
i) Fraud;
j) Failure to establish a statutory trust;
k) Outrage and intentional infliction of emotional distress (failure to complete mausoleum); and,
l) Class allegations.

(R. at 292-308) (Appendix, Exhibit "A")

Plaintiff alleged the class action was certified, (R. at 202-204), but when evidence failed to support the certification, it was decertified on June 24, 1984. (R. at 704-705)

A. Summary Judgment

On December 29, 1987, defendants moved for summary judgment. (R. at 1200-1225, 1189-1190, 1191-1193, 1198-1199) (Appendix, Exhibits "B," "C," "D" and "E") The motion

demonstrated there was insufficient evidence to support any of plaintiff's causes of action. Therefore, because there was no genuine issue of material fact at issue, defendants were entitled to judgment as a matter of law.

Plaintiff opposed the motion, filing an affidavit raising new issues. (R. at 1262-1265) (Appendix, Exhibit "F") The court denied defendants' motion and granted plaintiff leave to amend the complaint and to address the new issues and narrow the issues before the Court. The court, on its own Motion, continued the trial date. (R. at 1301) (Appendix, Exhibit "G")

On January 26, 1988, plaintiff filed her Fifth Amended Complaint, alleging:

a) Breach of contract for delayed performance;
b) Breach of warranty;
c) Common law fraud;
d) Violation of the Utah Consumer Sales Practices Act;
e) Breach of contract, unjust enrichment, interference with easement;
f) Breach of common law trust;
g) Breach of statutory trust;
h) Invasion of trust corpus;
i) Failure to establish a statutory trust;
j) Outrage and intentional infliction of emotional distress (disinterment of Mr. Wheeler); and,
k) Class allegations.

(R. at 1312-1342) (Appendix, Exhibit "H")

On February 11, 1988, defendants answered again and denying the allegations in support of the Fifth Amended Complaint.

(R. at 1343-1357)

Defendants had offered judgment in the sum of $4,000.00, pursuant to Rule 68 of the Utah Rules of Civil Procedure on January 8, 1988, after the Fifth Amended Complaint

was filed. (R. at 1294-1295) The tender was renewed February 11, 1988. (R. at 1359-1359) Neither offer was accepted.

On February 17, 1988, pursuant to plaintiff's express request for an expedited trial date, (R. at 1338-1341), the court ordered a scheduling conference. (R. at 1360) Although plaintiff's attorneys did not appear at the scheduling conference and were not available by telephone, (R. at 1360), the court granted the request for an expedited schedule and set the following schedule:

Discovery cutoff, June 10, 1988;

Motion cutoff, June 17, 1988;

Final pre-trial, June 21, 1988; and,

Trial, July 6 and 7, 1988.

Memorial Estates submitted Defendants' Fourth Set of Interrogatories to plaintiff by mail on April 29, 1988, addressing the new claims raised in plaintiff's Fifth Amended Complaint. (R. at 1361-1362) Plaintiff never responded, either by answer, objection or request for more time prior to defendants' motion for sanctions. On June 14, 1988, Memorial Estates moved for Summary Judgment, together with a Motion to Strike plaintiff's complaint and enter judgment against plaintiff, based upon plaintiff's failure to answer the interrogatories within the cut-off period and faced with an expedited trial setting of July 6.

The parties agreed to extend the time to hear pre-trial motions to June 21, 1987. (R. at 1365)

On June 21st, at the hearing on defendants' motions, plaintiff's attorneys hand-delivered to counsel for Memorial Estates plaintiff's purported answers to Defendants' Fourth Set of Interrogatories. Memorial Estates did not have the benefit of said interrogatory answers in connection with its Motion for Summary Judgment or its preparation for trial.

The court, after hearing argument, granted both defendants' Motion for Summary Judgment and Motion to Strike. (R. at 1377-1379) (Appendix, Exhibit "I")

B. Death of Plaintiff George K. Schoney.

At the June 21, 1988 hearing, the court also dismissed George K. Schoney as a party, inasmuch as his death had been suggested on the record in Plaintiff's Answers to Interrogatories, (copies of Plaintiff's Answers to Interrogatories were filed with defendants' Motion for Summary Judgment on December 29, 1987.) (R. at 1217) Thereafter, no party was substituted for him, pursuant to Rule 25 of the Utah Rules of Civil Procedure. (R. at 1377-1379)

Plaintiff argues in her brief that the trial court erred in granting summary judgment on only a portion of her claims. She claims the record contains sufficient evidence to preclude the granting of summary judgment with respect to the following causes of action:

1. Breach of Utah Code Ann. § 22-4-1 (75% trust);

2. Breach of contract by delay;

3. Breach of warranty regarding appearance of mausoleum;

4. Breach of contract for availability of chapel;

5. Common law fraud; and,

6. Intentional infliction of emotional distress for refusal to disinter Mr. Wheeler.

Plaintiff further argues that the death of George K. Schoney was not properly suggested on the record, and therefore, he should not have been dismissed.

The pleadings contain no significant admissions regarding material facts. The only material facts which were drawn to the attention of the trial court in connection with the dispositive motions are those stated in the attachments to Defendants' Memorandum in Support of Motion for Summary Judgment and in the affidavits of John MacKay, Kenith M. Hughes and Warren J. Christensen supporting defendants' Motion for Summary Judgment and those stated in the Affidavit of Erma Schoney opposing said Motion.

The alleged statements of fact in Appellant's Brief (excepting those statements from plaintiff's affidavit) were not raised in connection with defendants' Motion for Summary Judgment filed December 27, 1987, defendants' Motion for Summary Judgment filed June 14, 1988, or any other proceeding. These statements are not supported by the Record on Appeal. A majority of plaintiff's alleged facts are taken from the

unfiled and unpublished depositions of plaintiff, George K. Schoney and other individuals, which plaintiff failed to make available to the trial court as required by Rules 4-501 and 4-502 of the Utah Code of Judicial Administration. Furthermore, these depositions have not been made part of the record on appeal by plaintiff, as required by Rule 11 of the Rules of the Utah Court of Appeals.

Memorial Estates therefore submits the following statement of facts which were properly before the trial court and supported by the record on appeal.

STATEMENT OF FACTS

Clinton and Anna Wheeler, plaintiff's parents, owned four ground burial lots located at Memorial Estates Redwood Road Cemetery. (R. at 1191-1192) On December 29, 1973, the Wheelers gave two of their ground burial lots to plaintiff and her husband, George Schoney. (R. at 1169, 1192) The Wheelers and Schoneys subsequently traded in their ground burial lots as down payments toward the purchase of pre-need mausoleum spaces from Memorial Estates. (R. at 1192) Plaintiff and her husband entered into the "Mausoleum Estate Agreement" (hereinafter "Agreement") on January 29, 1974, made the first payment under the Agreement in February 1974 and continued making monthly payments for 36 months until the contract price was paid in full in January of 1977. (R. at 65, 111-112, 1192)

Clinton Wheeler died August 13, 1974, prior to the time that either Memorial Estate's mausoleum at Redwood Road or at Mountain View were completed, and his funeral services were

held at the Memorial Estates' Chapel, located at 5858 South 900 East, Murray, Utah. (R. at 241, 1192, 1203) No crypt was then available at the Mountain View mausoleum, and so, at the request of the family, his remains were interred at the Mountain View location in a ground burial plot. (R. at 1192) This was in accordance with the Agreement which provided that if a client died before the construction of the pre-need mausoleum crypt was completed, Memorial Estates would offer an alternative mausoleum location or interment in a ground burial plot. If the latter option was chosen, the family would have the right to have the deceased's remains relocated to the designated crypt, upon its completion, at Memorial Estates' expense. (R. at 10, 409)

Mrs. Wheeler passed away on May 22, 1982. Memorial Estates' services and facilities were not requested, and Mrs. Wheeler was interred at a mausoleum having no relationship with defendants (Sunset Lawn). At the family's request, Mr. Wheeler's remains were disinterred from the Mountain View ground plot vault and re-interred at the mausoleum at Sunset Lawn on the day of Mrs. Wheeler's funeral. (R. at 1192, 1271)

Plaintiff and her husband, George K. Schoney, also purchased mausoleum spaces at the mausoleum when her parents, the Wheelers had purchased spaces. (R. at 244) In 1976, Memorial Estates completed a 128 space mausoleum at the Memorial Estates' Redwood Cemetery. The Redwood Mausoleum is part of Memorial Estates' pre-need program. The mausoleum

remains only partially filled. (R. at 173, 352) Additional crypts will be added as the need arises. (R. at 408) In April 1985, Memorial Estates also completed a 276 space mausoleum at the Memorial Estates' Mountain View Cemetery, where plaintiff claims she wanted her spaces to be. Spaces have also been available in this mausoleum at all times since completion, but further additions will be built as the need may arise. (R. at 74, 173, 1192) In addition, Memorial Estates has held separate and reserved specific mausoleum spaces for plaintiff and her husband at its Redwood Road Cemetery since at least January 1977. (R. at 1191-1193)

Plaintiff's husband, George K. Schoney, died February 19, 1986, after Memorial Estates had completed construction of both the Redwood Road and the Mountain View mausoleums. However, George K. Schoney was also interred at the mausoleum space at Sunset Lawn as had been plaintiff's parents, Mr. and Mrs. Wheeler. (R. at 1217-1218) Plaintiff has never requested the use of Memorial Estates' facilities and services in connection with any lot, space or contract right owned by her. (R. at 583, 1192) She has made it clear that with respect to Mr. Schoney's death, or her own, (R. at 1219-1221), she has never intended to utilize the mausoleum space available at either Mountain View or Redwood Road, or Memorial Estates' chapels. Plaintiff had never made a request upon Memorial Estates for the use of a chapel or other facilities either at, or following Mr. Schoney's death. (R. at 1221)

Memorial Estates has always been ready, willing, and able to provide plaintiff with interment spaces in any of its completed mausoleums. Further, Memorial Estates has always been ready, willing, and able to provide plaintiff with the use of a chapel upon request as provided by the contract. (R. at 10, 146, 583)

By statute, Memorial Estates is required to retain certain funds for cemetery endowment care. There are sufficient funds for the cemeteries and mausoleums operated by Memorial Estates at both the Redwood and Mountain View locations. This fact has not been contested by plaintiff. (R. at 353, 358-359, 1199) Memorial Estates has complied fully and completely with the statutes and regulations of the State of Utah regarding cemeteries and mausoleums. (R. at 1190) In addition, Memorial Estates' endowment care contains sufficient funds to meet the requirements of Utah Code Ann. § 8-4-2. (R. at 1199)

The only documents containing averments of fact which were part of the record before the trial court were interrogatory answers, responses to requests for admission, affidavits and the depositions of Delmar Holt, Jr. and Richard Bentley, (both unsealed) as set forth below:

Document	Record Page No(s).
Answers to Plaintiffs' First Set of Interrogatories to Defendant Memorial Estates, Inc.	45-49

Document	Record Page No(s).
Answers to Second Set of Plaintiffs' Interrogatories	50-108
Affidavit of Kenith Hughes	141-145
Counter Affidavit of George Schoney	148-149
Affidavit of Kenith Hughes	173-176
Answers to Defendants' First Set of Interrogatories	236-250
Answers to Defendants' Request for Admissions	251-256
Answers to Defendants' Second Request for Admissions	352-355
Answers to Defendants' Second Set of Interrogatories	356-364
Affidavit of Delmar Holt, Jr.	405-406
Affidavit of Kenith Hughes	407-409
Affidavit of Kenith Hughes	582-584
Affidavit of Paul Moore	992-994
Affidavit of John MacKay	1189-1190
Affidavit of Kenith M. Hughes	1191-1193
Affidavit of Warren J. Christensen	1198-1199
Affidavit of Erma Schoney	1262-1265
Affidavit of Erma Schoney	1271-1274
Deposition of Delmar Holt, Jr.	1399
Deposition of Richard Bentley	1400

Assertions in the Statement of Facts submitted by plaintiff appear to raise questions regarding such matters as

representations by Memorial Estates' salespeople, release of Mr. Wheeler's remains for removal to Sunset Lawn and discussions plaintiff alleges took place with unnamed persons on the mausoleum construction sites. As stated above, those assertions come solely from unfiled depositions, and cannot be rebutted by facts contained in the record. Unfortunately, those assertions will have been reviewed before the arguments pointing out why those assertions are not properly before the Court. Therefore, defendants, submit that in the event the Court finds said assertions worthy of consideration, for any reason, the depositions should be located, filed and reviewed in their entirety, in which case, the Court will find that (1) there is no foundation for many assertions, and (2) the assertions do not rise to the level of issues of material fact.

SUMMARY OF ARGUMENT

1. Plaintiff failed to submit sufficient relevant evidence to the trial court to withstand defendants' motion for summary judgment with the affidavits submitted in support thereof.

2. The trial court properly entered judgment against plaintiff pursuant to Rule 37(d) of the Utah Rules of Civil Procedure, and plaintiff has failed to argue that said entry of judgment was improper.

3. The suggestion of George K. Schoney's death, made by plaintiff's interrogatory answer in the course of this

matter was sufficient to satisfy Rule 25 of the Utah Rules of Civil Procedure.

ARGUMENT

I

PLAINTIFF FAILED TO SUBMIT FACTS TO THE LOWER COURT SUFFICIENT TO PROVIDE A GENUINE ISSUE OF MATERIAL FACT AND FAILED TO CONTROVERT THE FACTS SUBMITTED BY MEMORIAL ESTATES.

Plaintiff does not address the trial court's ruling on five of the causes of action in Plaintiff's Fifth Amended Complaint, (R. at 12-42), apparently accepting the trial court's ruling on those causes of action.

Those causes of action that are argued in plaintiff's brief from Plaintiff's Fifth Amended Complaint include the following: "Breach of Contract for Delayed Performance," "Breach of Warranty" regarding mausoleum appearance, "Common Law Fraud," "Breach of Contract" for availability of chapel; "Breach of Utah Code Ann. § 22-4-1 (75% trust)," and "Outrageous & Intentional Infliction of Emotional Distress" for refusal to disinter Mr. Wheeler. With respect to each of those causes of action, plaintiff failed to show sufficient evidence to support the claim, and failed to controvert those facts submitted by Memorial Estates in defense of the claim.

A. Plaintiff failed to produce evidence that Memorial Estates had breached the Schoney's contract.

Plaintiff claims that Memorial Estates failed to perform its contractual obligations. The facts in the record

reveal that Memorial Estates has fully performed its contractual obligations.

Those obligations are:

1) To provide rights to mausoleum crypts for Mr. and Mrs. Schoney;

2) To construct a mausoleum;

3) To bury, disinter and place remains in mausoleum if space was not constructed at time of death;

4) To make available a full service chapel; and,

5) To place $20.00 in Trust "A" and $20.00 in Trust "B" to be applied to endowment care.

Performance was as follows:

1) Memorial Estates is holding two spaces for plaintiff at the Redwood Road mausoleum, and has space available at the Mountain View mausoleum, as well, which is available for plaintiff.

2) Memorial Estates has constructed two mausoleums.

3) Plaintiff chose to inter her husband at Sunset Lawn and has no intention to be interred at Memorial Estates.

4) Plaintiff chose not to use a Memorial Estates provided chapel for her husband's funeral and has no intention to use a Memorial Estates' chapel at her own funeral.

5) Memorial Estates has an endowment care fund which meets the requirements of the State of Utah and which exceeds the requirements of Trust "A" and Trust "B".

The trial court did not abuse its discretion in granting summary judgment. Memorial Estates has always been ready, willing, and able to perform each of its duties pursuant to the contract entered into with plaintiff. (R. at 10, 74, 146, 583, 1192-1193) Even if the contrary had been true, no evidence of damage could have been presented at trial.

B. Plaintiff's claim for breach of warranty is without merit.

Plaintiff's claim for breach of warranty is based upon the allegation that the mausoleums constructed by the defendants are different in appearance and quality from the appearance and quality the plaintiff believed they would have, based upon an artist's rendering plaintiff claimed was shown to her at the time she purchased her pre-need contract. First, The record contains no evidence of representations or warranties made by the defendants with respect to the appearance or quality of the mausoleum to be built pursuant to the pre-need contract. Second, the first mausoleum was finished in 1976. The claim for breach of warranty was first constructed in January 1988. The mausoleum appearance was obvious to the plaintiff from 1976, and therefore, she was on notice regarding the appearance and quality she now complains

of, 12 years prior to the first filing of this cause of action. Third, plaintiff has admitted she is not offended by the appearance of the Mountain View cemetery. (R. at 353-358) No issue has been raised to the effect that the appearance is inferior in any way. Finally, the statute of limitations had run long before the Fifth Amended Complaint was filed commencing in 1976 and running in 1980. (Utah Code Ann. § 78-12-25, § 78-12-25.5, as amended)

C. Because plaintiff failed to allege the elements of fraud, or raise issues sufficient to justify a finding of fraud.

In order to recover for fraud plaintiff must specifically plead and prove the following: (1) that a representation was made; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) recklessly made knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did, in fact, rely upon it; (8) and was thereby induced to act; (9) to its injury and damage. Cheever v. Schramm, 577 P.2d 951, 954 (Utah 1978); Pace v. Parrish, 122 Utah 141, 144-145, 247 P.2d 273, 274-75 (1952). In addition, the plaintiff must plead the conduct constituting fraud with particularity, (Utah Rules of Civil Procedure, Rule 9(b)), and the evidence of fraud must be "clear and convincing." Berkeley Bank v. Meibos, 607 P.2d 798, 801 (Utah 1980).

Plaintiff argues that the fraudulent conduct relates to defendants' representations that they would perform in the future by building mausoleums. Plaintiff's argument fails because there was no misrepresentation. Memorial Estates has built two mausoleums and has more than adequate crypt space available. Plaintiff's argument also fails because she has pled the allegations of fraud insufficiently. Because Memorial Estates' representation relates to future performance. The party pleading fraud must show that the defendants did not intend to perform at the time the promise was made. Rice, Melby Enterprises, Inc. v. Salt Lake County, 646 P.2d 696, 698 (Utah 1982). A subsequent change of mind or nonperformance is insufficient to prove fraud. Id. Plaintiff failed to show how Memorial Estates did not intend to perform at the time the promise was made. Plaintiff, in fact, would never be able to show Memorial Estates did not intend to peform, since Memorial Estates has in fact performed the promise. Finally, it should be noted that plaintiff never presented a submission which would raise the issue of any damage having been caused, even if her claim could be proven.

Those facts argued in the Brief of Appellant are not supported in the Record. Plaintiff does not point out a single fact from the Record from which it can be inferred that Memorial Estates did not intend to perform each of its obligations under the contract, at the time the contract was entered into.

D. Plaintiff failed to produce evidence that the chapel was not available for her use.

As set forth in the facts above, Memorial Estates has always been ready, willing, and able to provide a chapel for plaintiff's use. Plaintiff has never presented a submission to controvert the affidavit of Kenith Hughes on this issue. Plaintiff has never made request or demand on Memorial Estates for the use of a chapel. (R. at 583) In her Response to Defendants' First Request for Admissions, plaintiff admitted:

> Request No. 9:
>
> Admit that as of the date Plaintiffs filed their complaint they had not at any time requested the defendant to provide them the use of the chapel.
>
> Response:
>
> Deny in part. Plaintiffs have not requested chapel space for their own burial.

(R. at 254) See also Plaintiff's Answers to Interrogatories, dated August 13, 1987, ¶¶8 and 14.)

Not only is the evidence uncontroverted that a chapel was available and that plaintiff never asked to use the chapel; additionally, the plaintiff never made a submission which would raise the issue of any damage having been caused even if this claim could be proven.

E. Memorial Estates has committed no breach of trust.

As revealed by the affidavits of John MacKay, Warren Christensen and Kenith Hughes, Memorial Estates has complied

with all the conditions required of it by state statute regarding the maintenance of any endowment trust funds. Memorial Estates is audited on a yearly basis and these audits have revealed that Memorial Estates maintains the necessary money available for mausoleum and cemetery construction. (R. at 1190, 1199)

In addition, Section 22-4-1 of the Utah Code provided, at the time of acts complained of, that the 75% trust requirement did not apply to cemetery lots, vaults, mausoleum crypts, niches, cemetery burial privileges and cemetery space. The Schoneys had made their final payments in 1977. At that time, there was no requirement for any of that money paid to be set aside in trust pursuant to Section 22-4-1. In 1983, the legislature amended that section to include mausoleum space, but that provision is not applicable to the cause of action in this appeal because the last payment had been made six years before the amendment. Therefore, there can be no violation of that section as alleged by plaintiff.

The purpose of the 75% trust requirement is to ensure that funds are available to provide the services promised in the pre-need contract. In this case, the mausoleum promised was constructed, the construction trust requirement, if any, expired upon construction. Further, the facts reveal that Memorial Estates is in full compliance with all statutory endowment care requirements and, therefore, plaintiff cannot claim she has been damaged in any way.

Plaintiff's contract contains references to Trust "A" and Trust "B", endowment care trusts into which $20 of plaintiff's purchase funds were to be placed in each. At the time the present parties who own and manage the defendant corporations first became involved, which was after the time the plaintiff entered into her purchase contract, but before she paid the last payment, Trust "A" was insolvent. Trust "B", however, contains, at the present time, more than the requirement in the contract for "A"and "B", and the additional endowment fund required by the State also exceeds the requirement in the contract regarding Trust "A" and Trust "B". In any event, the plaintiff has made no submission of any evidence to raise the issue of damages having been caused, even if her claim can be proven.

F. Plaintiff's claim for intentional infliction of emotional distress must fail.

In order to recover under an action for intentional infliction of emotional distress, plaintiff must show that Memorial Estates' conduct was "outrageous and intolerable." Samms v. Eccles, 11 Utah.2d 289, 358 P.2d 344 (1961). The facts in this case, even as alleged by plaintiff, do not rise to this standard. Plaintiff complains that Memorial Estates refused to disinter Mr. Wheeler's remains which had been temporarily placed in a vault in a ground burial plot because the family wished to eventually use the as then incompleted Mountain View mausoleum, rather than the completed Redwood Road

mausoleum. The only fact in the record is that Mr. Wheeler's remains were promptly disinterred after the request was made and they were placed in the mausoleum at Sunset Lawn on the very day of his wife's funeral service. Therefore, as a matter of law, this claim cannot stand.

In addition, the allegations in the pleadings referring to the disinterment of Mr. Wheeler state the disinterment occurred on or before May 22, 1982. The longest possible statute of limitation period that could apply is four years from the occurrence, Utah Code Ann. § 78-12-25, as amended, even though plaintiff alleged this claim as an intentional tort, and the period could be less than four years. The claim was first made in January 1988. Because the claim was first raised five years and seven months after the occurrence, Memorial Estates was not notified of plaintiff's intent to raise the claim. The claim is barred by the statute of limitations.

Plaintiff claims that this claim should relate back to the claim for intentional infliction of emotional distress contained in the Second Amended Complaint, filed in 1983. The facts upon which the claim in the Second Amended Complaint (R. at 308) was alleged were those plaintiff claims amount to intentional or wilful delay of construction of the mausoleum. The failure to disinter claim stands on completely separate and distinct factual allegations. The facts upon which the claim

in the Fifth Amended Complaint (R. at 1325-1326) is alleged concern a supposed refusal to disinter Mr. Wheeler, a claim never pled prior to the filing of the Fifth Amended Complaint. The identity between the labels on the two claims is not sufficient to tie the new set of facts in the Fifth Amended Complaint to the date of the Second Amended Complaint.

The trial court did not abuse its discretion in ruling as a matter of law that plaintiff could not prevail upon any of these claims, based upon the record before the trial court.

II

PLAINTIFF'S ARGUMENTS ARE MOOT BECAUSE THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S FIFTH AMENDED COMPLAINT BECAUSE OF PLAINTIFF'S FAILURE TO ANSWER DEFENDANTS' FOURTH SET OF INTERROGATORIES IN A TIMELY FASHION. THIS MATTER HAS NOT BEEN APPEALED.

Plaintiff's brief does not contest the trial court's order granting defendants' Motion to Strike plaintiff's Fifth Amended Complaint. The ruling on that Motion, and consequent entry of judgment for Memorial Estates on all issues, renders all of plaintiff's arguments on appeal moot.

The original complaint was filed in 1982. Defendants' summary judgment motion, on December 29, 1987, demonstrated that the conditions alleged in the complaint could not be proven. By way of response to defendants' December 29, 1987 Motion for Summary Judgment, plaintiff requested and received leave of the court to file another amended complaint. It was filed January 26, 1988, over five and one-half years after the original complaint. (R. at 1312) The Fifth Amended Complaint

raised new issues and at least five new and additional causes of action, to wit: "Breach of Warranty," "Unjust Enrichment," "Interference with Contract," "Breach of Common Law Trust," and "Outrage and Intentional Infliction of Emotional Distress (Disinterment of Mr. Wheeler)". The new causes of action required additional discovery by defendants, but the plaintiff had also requested that the court set an expedited trial date. The court granted the request and set the date of July 6, 1988 to commence trial.

On April 29, 1988, Memorial Estates submitted Defendants' Fourth Set of Interrogatories to Plaintiff by mail. The principal fact which had changed from the dates of the first and second complaints to the date of the fifth complaint had to do with defendants' construction of two mausoleums. Defendants' Fourth Set of Interrogatories addressed issues concerning the construction and appearance of those mausoleums, which were issues raised for the first time in the plaintiff's Fifth Amended Complaint.

The last day to answer interrogatories in accordance with the provisions of Rule 33(a) was June 1, 1988, only a month and six days before trial. The last day to respond to all discovery, pursuant to the Court's scheduling order, was June 10, 1988. Counsel for Memorial Estates requested the answers from counsel for plaintiff between June 2 and June 13 (Transcript of hearing, June 21, 1988 at 3), and, when no answers were forthcoming, on June 14, 1988, Memorial Estates

filed a Motion to strike plaintiff's Fifth Amended Complaint and to enter judgment on behalf of Memorial Estates for reason of plaintiff's failure to answer the interrogatories.

Purported answers to those interrogatories were delivered to counsel for defendants at the time of hearing. No certificate regarding service or filing of complete interrogatory answers is in the record.

Rule 37(d) of the Utah Rules of Civil Procedure provides that if a party fails to serve answers to interrogatories:

> The court in which the action is pending, on motion, may make such orders in regard to the failure as are just, and among others, it may take any action authorized under paragraphs (A) (B) and (C) of subdivision (b)(2) of this Rule.

Rule 37(b)(2)(C) provides in part:

> . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . . .

In the case of W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734 (Utah 1977), the Utah Supreme Court addressed a situation comparable to the one in the instant matter. In that case, as in this case, the court granted a summary judgment and at the same time, granted judgment by default as a sanction pursuant to Rule 37(d). Addressing the issue of judgment by default as a sanction, the Court commented on the amendment in 1972 which changed Rule 37(d) of the Utah Rules of Civil Procedure to correspond with the 1970 amendment to Rule 37 of the Federal Rules of Civil Procedure and quoted

8 Wright & Miller, Federal Practice and Procedure § 2291, page 807-812 with approval as follows:

> Rule 37(d) allows the imposition of sanctions against a party for especially serious disregard of the obligations imposed upon him by the discovery rules even though he has not violated any court order . . . . Until 1970, the rule applied only if a failure by a party was willful. This limitation has been eliminated. In addition, the rule now says, as Rule 37(b)(2) always has said, that the court is to make "such orders with regard to the failure as are just." Taken together, these two changes mean that any failure of the sort described in Rule 37(d) permits invocation of the rule, regardless of the reason for the failure, but that the court has discretion about the sanction to be imposed.

Gardner at 737.

In Gardner, the defendants contended the sanction was inappropriate because they had served answers to the interrogatories prior to the hearing on the motion for a default judgment. The court rejected that argument stating that if a party fails to answer within the specified time under the rule, that party has failed to answer and the court may appropriately invoke the sanctions.

In Gardner, as in the instant matter, the party that failed to answer also failed to object to the interrogatories, to request additional time or to explain or justify the failure to answer, and the Gardner Court ruled that the trial court was justified in finding there was no reasonable excuse for the failure to comply with Rule 33. The Court further stated, paraphrasing the case of Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Echols, 138 Ga. App. 593, 226 S.E.2d 742, 743 (1976):

> . . . there was no significance in the fact plaintiff submitted answers to the propounded questions before the hearing on defendant's motion for sanctions. The court ruled once the motion for sanctions has been filed, the opposing party may not preclude their imposition by making a belated response in the interim between the filing of the motion for sanctions and the hearing on the motion.

The Court reiterated that sanctions are appropriate whether a party has moved pursuant to Rule 37(a)(2) for an order compelling the other party to respond to discovery, or not, and further stated:

> The extreme sanction of default or dismissal must be tempered by the careful exercise of judicial discretion to ensure its imposition is merited. Under Rule 37(d), sanctions are justified without reference to whether the unexcused failure to make discovery was willful. The sanction of default judgment is justified where there has been a frustration of the judicial process vis., where the failure to respond to discovery impeached trial on the merits and makes it impossible to ascertain whether the allegations of the answer have any factual merit.
>
> A defendant may not ignore with impunity the requirements of Rules 33 and 34 and the necessity to respond within 30 days, to request additional time or to seek a protective order under Rule 26(c). A party to an action has a right to have the benefits of discovery procedure promptly, not only in order that he may have ample time to prepare his case, but also in order to bring to light facts which may entitle him to summary judgment or induce settlement prior to trial.

Gardner at 738.

Gardner applies to the instant case because plaintiff's failure to respond to the interrogatories impeded not only the defendants' presentation of their Motion for Summary Judgment,

but it also impeded preparation for trial on the merits and prejudiced the defendants by effectively preventing defendants from following up on their timely discovery request when trial was set to commence only two weeks away.

Plaintiff's arguments are moot because the trial court did not abuse its discretion in striking the plaintiff's complaint and entering judgment in favor of Memorial Estates, pursuant to the provisions of Rule 37(d) of the Utah Rules of Civil Procedure. Plaintiff never appealed this decision and accordingly, it stands, thereby mooting plaintiff's appeal.

III

THE "FACTS" STATED IN PLAINTIFF'S STATEMENT OF FACTS WERE NOT BEFORE THE TRIAL COURT AND ARE NOT PART OF THE RECORD ON APPEAL.

In plaintiff's brief, plaintiff alleges facts that were not before the trial court and are not before this Court. Plaintiff has cited almost exclusively to depositions that were neither filed nor published, and were in fact not accessible to the trial court judge. The trial court judge was not apprised of plaintiff's reliance on said alleged facts either on defendants' December 27, 1987 Motion for Summary Judgment or upon Defendants' January 14, 1988 Motion for Summary Judgment.

In Conder v. A.L. Williams & Associates, Inc., 739 P.2d 634 (Utah App. 1987) this Court upheld the Utah Supreme Court's denial of a motion to supplement the record on appeal to

include depositions which had not been published in the trial court. In a concurring opinion, Judge Orme explains that it was the failure to file the depositions, which was fatal to the motion to supplement. A filed deposition may be relevant and material to a motion for summary judgment, and if so should be considered by the trial court and the appellate court.

> Rule 56(e) entitles a party to summary judgment "if the pleadings, depositions, answers to interrogatories and answers to admissions on file, together with affidavits, if any" so warrant.

Id. at 641 (emphasis added).

Rule 56(e) specifically provides that the depositions be filed.

If the depositions are not filed, the trial court cannot consider them or allegations regarding their content, because said allegations cannot be verified. Likewise, if not filed, the depositions cannot be part of the record on appeal.

In Thompson v. Ford Motor Co., 14 Utah 2d 334, 384 P.2d 109 (1963), both parties cited to depositions that had remained sealed. The depositions had never been seen by the trial court, and the supreme court therefore did not open the depositions. In a footnote, the Utah Supreme Court noted that the correctness of the depositions used by the parties could not be known. Thompson, at 109.

Because the statements relied upon by plaintiff are cited only to unfiled depositions, plaintiff's statement of facts should not be considered by this Court.

IV

GEORGE K. SCHONEY WAS PROPERLY DISMISSED AS A PARTY.

Rule 25(a) of the Utah Rules of Civil Procedure requires dismissal of a deceased party unless a motion for substitution is made with 90 days after the death of that party is suggested.

The suggestion of Mr. Schoney's death was made and filed with the Court. It was made in Plaintiff's Answers to Interrogatories, a copy of which was filed with the trial court attached to defendants' Memorandum in Support of their Motion for Summary Judgment filed December 29, 1987. (R. at 1202-1225) The suggestion was properly recorded and served on plaintiff through her attorney of record.

Ninety days after the suggestion of death was filed with the trial court, no party had been substituted for the deceased and no one had sought an extension of time in which to file a substitution. Finally, on June 21, 1988, Memorial Estates made a motion to dismiss George Schoney as a party to the action. At the time of the motion to dismiss, plaintiff showed no circumstances which could conceivably justify her failure to substitute another party as plaintiff. George Schoney had been deceased for over 27 months, long before the motion was made, giving plaintiff ample time to make a proper party substitution.

Plaintiff argues notifying and serving George Schoney's attorney is not sufficient to make a suggestion of death

because that attorney is not a representative of the deceased party's estate, and that therefore, no representative of George Schoney's estate was properly notified or served. However, notification and service on plaintiff was appropriate pursuant to Rule 25(a), because plaintiff is a successor heir and beneficiary of George Schoney and is represented by the same counsel that represented George Schoney up until his death in this action.

Plaintiff also argues the suggestion of death was improper because it was not made pursuant to Form 30 of the forms appended to the Utah Rules of Civil Procedure. The "Appendix of Forms," Introductory Statement, reads: "The following forms are intended for illustration only." Form 30 is not required to be used in a suggestion of death. In fact, Utah Rules of Civil Procedure, Rule 25(a) only requires that the suggestion be made "upon the record by service of a statement of the fact of the death." Here the suggestion of death was made upon the record by service of a statement of the fact of the death from the plaintiff herself in her answer No. 1 found in Plaintiff's Answers to Interrogatories. (R. at 1217)

For the foregoing reasons, the suggestion of death was properly stated, served, and recorded. Because plaintiff failed to make a motion within 90 days of the suggestion to substitute the deceased party, George Schoney was properly dismissed as a plaintiff.

V

PLAINTIFF IS LIMITED ON APPEAL TO THOSE ARGUMENTS CONTAINED IN APPELLANT'S BRIEF.

Plaintiff in her docketing statement has stated many issues. However, plaintiff has failed to support many of those issues in her brief, either with any references to the record on appeal or with authority for the proposition contained in the docketing statement. The docketing statement "is not a brief and should not contain arguments or procedural motions." Rules of the Utah Court of Appeals, Rule 9. The stating of an issue without argument does not serve to point out specific errors or points within the scope of some specific assignment of error.

> Where a point is merely asserted by appellate counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court.

People v. Dougherty, 188 Cal. Rptr. 123 (Dist. Cal. 1982). Issues listed in a docketing statement but not briefed are deemed abandoned. State v. Eder, 704 P.2d 465, 469 (N.M. App. 1985).

The docketing statement provides the court with a concise listing of the arguments expected to be raised by plaintiff and Memorial Estates. It is incumbent upon the plaintiff to state fully with record references and supporting authority the arguments which allegedly weigh counter to the trial court's findings. The reviewing court is not required to

make an independent search of the record for supporting authority when the plaintiff has failed to sufficiently state the basis of its claim. See Dougherty, 188 Cal. Rptr. at 123.

Where plaintiff has failed in her brief to support issues raised in the docketing statement, the plaintiff has not provided Memorial Estates with a fair opportunity to respond to the arguments. That failure, together with the failure to cite the record and/or authority in support of points of error, constitutes waiver of any argument regarding any such claimed error. See Lecky v. Warren, 635 S.W.2d 752, (Tex. App. 1982).

CONCLUSION

Plaintiff does not raise factual questions which could in any way lead to the relief she demands. Nowhere does she raise any issues as to how or in what amount she has been damaged. She has never made demand for performance. Defendants were and are ready, willing and able to perform all of their duties under the contract. Not only did the trial court not abuse its discretion; but, based upon the facts in the record, any other action by the trial court would have been an abuse of its discretion.

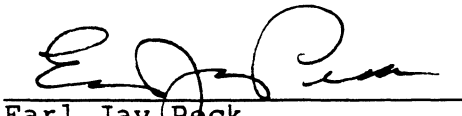
For a number of reasons the trial court judgment should be affirmed:

1) The trial court ruling on Memorial Estates Motion to Strike the Fifth Amended Complaint renders plaintiff's arguments on appeal on all issues moot.

2) Plaintiff failed to submit sufficient facts to the trial court to support the finding that plaintiff could have prevailed on any cause of action.

3) There are insufficient facts in the record on appeal to support any of the arguments advanced by plaintiff on this appeal.

RESPECTFULLY SUBMITTED this 10TH day of May, 1989.



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CERTIFICATE OF SERVICE

I hereby certify that on the 10TH day of May, 1989, I caused four true and correct copies of the foregoing Brief of Respondent to be placed in the United States Mail, first-class, postage prepaid, addressed to the following:

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Exhibit D

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Dear Sirs:

Re: Schoney vs. Memorial Estates

On July 21, 1989 a pen and ink change was made on the Reply Brief submitted to the Court of Appeals on the above-referenced case. The number 834 has been added on Page 2, as shown on the page enclosed for your reference.

Sincerely,

ROBERT J. DEBRY & ASSOCIATES

G. STEVEN SULLIVAN

GSS/kp
Enclosure

> A class action may not be dismissed or compromised without the approval of the Court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs.

IV.

ARGUMENT

DUE PROCESS CONCERNS HAVE ARISEN IN THIS CASE

A. Introduction

This will not be a traditional reply brief. The procedural history of this case is so unusual that a traditional brief is not possible.

Specifically, recent rulings of this Court raise serious due process issues. Schoney is obligated to advise the Court of such due process issues at the earliest possible time. See Sparrow v. Reynolds, 646 F. Supp. 834 (D.C.D.C. 1986); Cf. Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967).

Furthermore, error is often cumulative. See In Re: Santrucek, 145 N.E. 739 (1924) (per Justice Cardozo); Allett v. Hill, 422 So.2d 1047 (Fla.App. 1982); Wiedower v. ACF Industries, 763 S.W. 2d 333 (Mo.App. 1988). Therefore this reply brief will present the due process issue in the context of the overall case.

IN THE UTAH COURT OF APPEALS

GEORGE K. SCHONEY and ERMA J. SCHONEY, et al. Plaintiffs/Appellants, vs. MEMORIAL ESTATES, INC., et al., Defendants/Respondents.	REPLY BRIEF Case No. 880630-CA Category No. 16(b)

On Appeal From The Third District Court Salt Lake County

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III.

SUMMARY OF ARGUMENT

This case is seven years old. After a number of delays and superficial rulings, Judge Moffat granted summary judgment for Memorial Estates. The trouble is that he didn't bother to read the file. The summary judgment was granted on the broadest possible grounds.

Because of the unusual treatment in the trial court, Schoney was required to brief all possible theories in this complex case. Because of a computer failure, Schoney's final 79-page brief was delayed. This Court struck the 79-page brief and received, instead,a 30-page preliminary draft brief.

However, the 30-page brief did not include treatment of the class issues. Therefore, by striking the 79-page final brief, this Court effectively dismissed a putative class. Such a dismissal violates due process standards established by the United States Supreme Court, as well as Utah Rule of Civil Procedure 23(e), which states:

> A class action may not be dismissed or compromised without the approval of the Court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs.

IV.

ARGUMENT

DUE PROCESS CONCERNS HAVE ARISEN IN THIS CASE

A. Introduction

This will not be a traditional reply brief. The procedural history of this case is so unusual that a traditional brief is not possible.

Specifically, recent rulings of this Court raise serious due process issues. Schoney is obligated to advise the Court of such due process issues at the earliest possible time. See Sparrow v. Reynolds, 646 F. Supp. (D.C.D.C. 1986); Cf. Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967).

Furthermore, error is often cumulative. See In Re: Santrucek, 145 N.E. 739 (1924) (per Justice Cardozo); Allett v. Hill, 422 So.2d 1047 (Fla.App. 1982); Wiedower v. ACF Industries, 763 S.W. 2d 333 (Mo.App. 1988). Therefore this reply brief will present the due process issue in the context of the overall case.

B. Delay

This case was filed on June 14, 1982. The case has been set and reset for trial six times! Schoney was responsible for one continuance due to a change in staff. (R. 510-513.) The other continuances were granted for the convenience of the court or the convenience of Memorial Estates. Several of the delays were from first place trial settings. (See Chronology at Brief of Appellant, p. 8-9.) Twice Schoney sought assignment of a special judge to avoid such delays. (R. 522, 1085.) Neither request was granted.

If this case is remanded, it will likely take another year to get on the trial calendar, and perhaps two years to process an appeal from the trial. When the Schoneys first walked into a lawyer's office seven years ago, little did they realize that it would take a decade to process their modest claim.

C. Class Certification and Motions to Enlarge the Class

Early in the litigation, the trial court judge (Fishler) certified the case to proceed as a class action. (R. 186, 202-204.)

The original class certification was based upon rather narrow theories. (See R. 202-204.) Therefore, Schoney made a motion to enlarge the class to include the additional theories and additional parties. (R. 278.) At about the same time, Memorial Estates made a motion to decertify the class. (R. 487.)

Judge Dee ruled first on the decertification motion. (R. 726, p. 1 & 2.) Judge Dee granted that motion to decertify the class.[1] Next, Judge Dee entertained arguments on the motion to enlarge the class.[2] (R. 726, p. 1-3.)

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[1] The theory of liability was that Memorial Estates sold space in non-existent mausoleums, and that Memorial Estates delayed construction for up to ten years. (See R. 2.) Judge Dee limited the potential class to 26 persons. Apparently only 26 persons signed the same form of contract as Schoneys.

Even though the contract form changed slightly, Schoney presented nearly 300 contracts from customers who were victims of the same course of conduct. (R. 727-991.)

As a part of that same scheme, Memorial Estates issued deeds in non-existent mausoleums. Schoney identified 68 identical deeds for Mountain View and 147 identical deeds for Redwood. (R. 628-629.)

[2] Since the class was then decertified, Schoney verbally amended the Motion to Enlarge the Class, to be a Motion to Recertify the Class based upon the new theories of liability. (See R. 726 at p. 3.)

Memorial Estates argued that the Motion to Enlarge the Class presented no new theories.

> MR. SWOPE: Your Honor, it's in the Amended Complaint, the Second Amended Complaint, which has been before this Court since June 1983, Count V, Breach of Contract to Provide Chapel. It's been before the Court. Count VI, Breach of Trust. It's been before the Court. Count VII, Breach of Statutory Trust. It's been before the Court. Count VIII, Invasion of Trust Corpus. Count X, Failure to Establish a Statutory Trust. All these have been before the Court. These are not new issues. (Emphasis added.)

(R. 726, p. 8.)

The Court agreed with Memorial Estates. The Court denied the Motion to Enlarge the Class. However, the Court's ruling did not go to the merits. The Court simply concluded that the Motion to Enlarge the Class had already been considered:

> And the date of my decision (to decertify the class) being last Tuesday covers all of the things that have been done so far. . . So I've considered all of these new theories, and I am denying your Motion to Enlarge the Class for the three theories, which are not new theories. They have already been considered. They are in writing in the file. And I'm decertifying the class. (Emphasis added.)

(R. 726, p. 11-12.)

In short, Judge Dee (second judge) simply side-stepped the issue. It is abundantly clear that the Motion to

Decertify the Class presents wholly different issues from the Motion to Enlarge the Class. (Compare R. 202-204; R. 280-285; and R. 487-492.) Rather Judge Dee (second judge) simply followed the misleading statement of Memorial Estates' counsel.[3]

D. Repeated Application For Summary Judgment

After waiting literally six years to get a trial date (See para. B above) and after the class was dismissed under unusual circumstances (See C above), the eve of the trial finally approached. By now a third judge was on the scene (Moffat).

Memorial Estates filed a motion for summary judgment. (R. 1363.) The Motion for Summary Judgment was granted. (R. 1377.) This appeal followed.

The problem is that this was Memorial Estates' third try at summary judgment. Twice before Memorial Estates had filed -- and lost summary judgment motions. (R. 700 and R. 1301.) The third Motion for Summary Judgment was in all material respects exactly the same as the first two motions for summary judgment. (Compare R. 472; R. 1200; and R. 1363.)

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[3] [Mr. Swope for Memorial Estates] "All these have been before the Court. These are not new theories." (R. 726, p. 8.)

In short, Memorial Estates' judge shopping finally paid off and they found a judge who would agree with their theories. The problem is that such judge shopping is a square violation of §78-7-19, Utah Code Ann.

> If an application for an order. . . is refused in whole or in part. . . no subsequent application for the same order can be made to any other judge, except of a higher court.

E. Failure to Review the Record

Undaunted by the fact that the same motion had been heard on two prior occasions, (See Para. D above) Judge Moffat forged ahead. The problem is that Judge Moffat didn't bother with the nicety of reading the file. After two other judges had managed this complex case for over six years, Judge Moffat casually mentioned:

> . . . We have a Motion for Summary Judgment. Haven't had a chance to look at the file. . .

(June 21, 1988 Transcript at p. 2, Lines 4-5.)

Thus Judge Moffat could not follow his duty to, "... carefully scrutinize the submissions and contentions..." Rich v. McGovern, 551 P.2d 1266 (Utah 1976). Under lesser circumstances, federal courts have reversed summary judgments. Keiser v. Coliseum Properties, Inc., 614 F.2d 406 (5th Cir.

1980); Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922 (1st Cir. 1983).

During the course of the summary judgment hearing, numerous fact issues were examined: viz. whether defendant's interrogatories were lost or delayed in the mail (June 21, 1988 Tr. p. 5, Lines 18-25); whether Memorial Estates had ever made a suggestion of death on the Record (June 21 Tr. at p. 11, Lines 17-20; p. 12, Lines 10-13); whether an offer of judgment in the sum of $4,000 would satisfy all of Schoney's claims (June 21 Tr. at p. 14, Lines 7-11); whether Schoneys were shown a picture of the mausoleum before it was constructed (June 21 Tr. at p. 15, Lines 2-13); whether the Schoneys were shown a rendering of a mausoleum at Redwood Road or Mountain View (June 21 Tr. at p. 16, Lines 20-25); whether the mausoleums at Mountain View and Redwood Road were substantially the same (June 21 Tr. at p. 17, Lines 11-15); whether the construction of a mausoleum at Redwood Road put the Schoneys on notice that a later mausoleum at Mountain View would be of the same quality (June 21 Tr. at p. 18, Lines 6-10); whether a chapel has always been available at Mountain View (June 21 Tr. at p. 18, Line 22 - p. 19, Line 5); whether it was reasonable for Schoneys to purchase an alternate mausoleum space (at Sunset Lawn) (June 21 Tr. at p. 27); whether Memorial Estates

sold more crypts than had been constructed (June 21 Tr. at p. 31, Lines 1-4); whether the Schoneys purchased a mausoleum at Redwood Road or Mountain View (June 21 Tr. at p. 36 and 37); whether Memorial Estates properly accounted for trust funds (June 21 Tr. at p. 43, Lines 8-22); whether Memorial Estates held a dead corpse as a hostage (June 21 Tr. at p. 46, Lines 1-9); whether Memorial Estates told Schoneys that their money would be held in trust (June 21 Tr. at p. 46, Lines 10-19); whether Memorial Estates represented that a mausoleum would be built when there were no plans to do so (June 21 Tr. at p. 47, Lines 1-7); whether it was reasonable for Memorial Estates to substitute an LDS chapel for the Schoneys, who were a non-LDS family (June 21 Tr. at p. 48, Lines 12-22); whether a chapel was available at both Mountain View and Redwood Road (June 21 Tr. at p. 51, Lines 1-3); whether Memorial Estates was prejudiced[4] because Schoney answered interrogatories approximately 15 days late.[5] (June 21 Tr. at p. 5, Lines 1-15.)

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[4] Memorial Estates was guilty of numerous discovery delays much more serious than 15 days. (See Brief of Appellant at p. 7.)

[5] Memorial Estates argued that the case of W.W. & W.B. Gardner v. Parkwest Valley, 568 P.2d 734 justified dismissal as a sanction. (June 21 Tr. at p. 4-5.) Without reading the case, Judge Moffat held that the Gardner case "requires" dismissal. (June 21 Tr. at 51.)

In summary, it was clear error for Judge Moffat to grant summary judgment in such a complicated case, and in face of numerous fact issues, without even reading the file.

F. Refusal to Permit Schoneys to File a Complete Brief

After losing in the trial court, Schoneys appealed. The legal theories were numerous and complex. At the conclusion of oral argument, Judge Moffat stated:

> I think Mr. Peck's motions are well taken in every instance. . .

(June 21 Tr. at p. 51.)

That simple statement covers a lot of territory. Such a shotgun ruling, ". . . made without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision [does not] allow for a disciplined and informed review of the Court's discretion." Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978). Compare Rule 52(a), Utah Rules of Civil Procedure.[6] In short, Schoney was left to brief all possible issues in a very complex case.

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[6] "The Court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules . . . 56. . . when the motion is based on more than one ground."

Schoney filed a 30 page preliminary draft brief, and moved for an additional five working days to file the final brief. The grounds for the motion were that the word processing equipment had broken down. (Motion and Order to File Brief with Leave to File Substitute Brief, dated February 10, 1989.) That motion was denied. (Order, dated March 7, 1989.) See Exhibit A.

With one exception, Schoney does not wish to reargue the substance of that order -- nor would it be proper to do so. However, one aspect of that order raises due process concerns.

Schoneys filed a 30 page preliminary draft brief. In connection with that filing, Schoney specifically noted that:

> Appellant's counsel has prepared a brief and motion to file with leave to substitute Exhibits A and B hereto are drafts of both. The draft of the brief is not the current one; the current one is in the word processor memory. At about 9:00 a.m. today, February 10, 1989, the office printer broke down. . .(Emphasis added.)

(Motion to File Brief with Leave to File Substitute Brief, dated February 10, 1989.) The motion was attested by the manager of the word processing department.

This Court's order of March 7, 1989 did not permit Schoney to file the version of the brief that was finished--albeit locked in a broken down computer. Rather, this Court's order stated:

> It is further ORDERED that the draft brief filed on 10 February, 1989 shall comprise Appellant's Brief. Appellant shall have the draft bound and shall file the bound brief before 10 March, 1989.

(Order, 7 March, 1989.)

In summary, Schoney was faced with an awesome task to summarize six years of litigation in a final appellate brief. The task was especially difficult because of the superficial treatment of issues, and shotgun rulings below. (See Para. C, D, E, above.) Schoney had in fact written a complete brief.[7] However, because of an equipment failure, Schoneys were not permitted to file that complete brief.

G. Dissolution of Class

The 30 page brief filed on February 10 did not include a treatment of class issues. The final 79 page brief,

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[7] Schoney believes that the Brief which was locked in the computer on February 10, 1989 was, in fact, the 79 page Brief dated 21 February, 1989 (which was rejected by this Court.) However, the attorney in charge of the file has been fired for his mishandling this appeal. Thus, it may not be possible to reconstruct exactly what was in the computer on February 10, 1989.

which was rejected by this Court, did include a treatment of the class issues.

Without regard to fault or error,[8] the result is that the putative class has disappeared. However, that violates due process rights of the putative class members.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306; 70 S.Ct. 652 (1950).

Although Mullane was not a class action, it provides the due process touchstone for all class actions, see Phillips Petroleum v. Shutts, 472 U.S. 797, 812 (1985). In order to implement those due process considerations, Rule 23(e) Utah Rules of Civil Procedure states:

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[8] This Court apparently views the issue as being Schoney's fault for trying to make substantive changes after a brief was filed pursuant to the Court's "Lodging Policy". See Order, 7 March, 1989. On the other hand, Schoney views the issue as clear error. Schoney contends that the February 10, 1989 filing had nothing to do with the "Lodging Policy". (That policy has never been promulgated.) Rather, it was a garden variety showing of "good cause" for an enlargement of time pursuant to Rule 22(b), Rules of the Utah Court of Appeals. (See Schoneys' Motion for Review, dated 9 March, 1989.)

> A class action shall not be dismissed or compromised without the approval of the Court, and notice of the dismissal or compromise shall be given to all members of the class in such manner as the court directs. (Emphasis added.)

Due process considerations require that Rule 23(e) should apply even where the class has not been certified if there is any prejudice to absent class members. Simer v. Rios, 661 F.2d 655 (7th Cir. 1981).

In this case, absent class members are prejudiced because they might choose to file individual claims if they were aware that the class was dissolved. Furthermore, this Court has failed to even consider Rule 23(e) in connection with the dismissal (or dissolution) of the class.[9]

V.

CONCLUSION

This case has been fraught with delay and superficial treatment by the trial court. The cumulative error required Schoney to write a far reaching brief on every possible aspect

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[9] It is no solution for the Court to simply blame Schoney's counsel. Due process requires that the named plaintiff at all times adequately represent the interests of the class. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

of the case. Schoney accomplished that formidable task in a reasonable time. Because of equipment failure the final draft of the brief was delayed. This Court struck Schoney's final brief, and with that ruling the class also fell.

The totality of these circumstances has deprived putative class members as well as Schoney of their due process rights.

The only solution is to remand to the trial court for total reprocessing of the class issues and the summary judgment issues.

DATED this 20 day of July, 1989

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Appellant

BY: /s/
ROBERT J. DEBRY

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four true and correct copies of the foregoing REPLY BRIEF, postage prepaid, this 20 day of July, 1989 to the following:

JOSEPH L. HENRIOD
ROMNEY, CONDIE, HENRIOD & HENRIOD
700-38 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

ARTHUR H. NIELSEN
DAVID SWOPE
NIELSEN & SENIOR
36 South State, #1100
Salt Lake City, Utah 84111

/s/

SP8-042/ljf/ek

EXHIBIT A

The lodging policy in effect in February 1989, provided appellant five additional working days to correct technical defects and to file a substitute brief. Appellant failed to file a substitute brief within the five day period. By correspondence dated 16 February 1989, the Court notified appellant that the brief was in default and that the appeal could be dismissed unless a substitute brief was filed by 24 February 1989.

Appellant's substitute brief was filed on 21 February 1989. The brief, exclusive of the table of contents, table of authorities and appendix, is 79 pages in length. Appellant's corrections go to the substance of the brief as well as to defects which may be addressed under the lodging policy. Thus, the substitute brief is improper.

Now, therefore, it is hereby ORDERED that appellant's Motion To File Overlength Brief is denied. It is further ORDERED that the draft brief filed on 10 February 1989 shall comprise appellant's brief. Appellant shall have the draft bound and shall file the bound brief, together with seven copies, on or before 10 March 1989. Although the overlength brief is not accepted, the Appendix To Appellant's Brief, filed 21 February 1989, is accepted.

IN THE UTAH COURT OF APPEALS

----ooOoo----

George K. Schoney and Erma J. Schoney, et al.,	)	
Plaintiffs and Appellants,	)	ORDER
v.	)	Case No. 880630-CA
Memorial Estates, Inc.,	)	
Defendants and Respondents.	)	

This matter is before the Court upon (a) appellant's several motions for extensions to file appellant's brief, (b) appellant's Motion To File Overlength Brief, filed 21 February 1989, (c) respondent's Motion To Dismiss, filed 21 February 1989 and (d) appellant's Motion To Refer Motion To Dismiss, filed 1 March 1989.

On 10 February 1989, appellant filed a 30 page brief, in draft form, together with a Motion To File Brief With Leave To File Substitute Brief. Thereafter, on 21 February 1989, appellant filed a Motion To Extend Time For Filing Substitute Brief and a Motion To File Overlength Brief.

The substitute brief was filed pursuant to the Court's internal policy for lodging briefs. The purpose of the policy is to permit a party, who makes a good faith effort to timely file a brief, extra time to correct technical defects in the brief. Technical defects include improper covers, inadequate binding or lack of binding, incorrect pagination, and etc. The lodging policy does not provide an opportunity to amend the substance of the arguments contained in the brief.

COPY

It is also ORDERED that respondent's Motion To Dismiss is denied. Respondent's brief shall be due thirty days from 10 March 1989. That is, respondent shall file its brief on or before 9 April 1989. Further, it is ORDERED that appellant's Motion To Refer Motion To Dismiss is denied.

Dated this 7th day of March 1989.

BY THE COURT:

Russell W. Bench

Judge Russell W. Bench

Exhibit E

I have the answer. I am looking for the Fifth Amended Complaint. I have got it. Thank you.

You may proceed. It was out of order.

MR. HENRIOD: Thank you, your Honor.

The first motion we would like to make is the motion to strike. A little background is helpful. The defendant made a motion for summary judgment on January 15th; and at that time, the plaintiffs' response was to request the Court to allow them to address those issues with another amended complaint, the fifth one.

On the part of the defendant, we reasonably anticipated they were going to cut down on the complaint, based on the argument that we made in our motion for summary judgment. As a matter of fact, they didn't. They left everything in, and included additional items to which we needed to do some discovery.

The Court set a discovery schedule. The last date for responding to discovery was June 10th. On April 29th, the defendant sent interrogatories to the plaintiff. There were no answers within 30 days. They were not answered by the 10th. There was communication with counsel. I don't know why they weren't answered on time. Some scheduling problems.

We received a copy of the answer this morning as we came into the courtroom. It's the defendants' position

that the complaint should be stricken and the default judgment should be entered against the plaintiff because of their failure to answer those interrogatories in a timely fashion.

We would cite to the Court the case of W.W.&.W.B. Gardner, Inc. vs. Parkwest Valley, Inc., found at 568 P.2d, Page 734, a 1977 Utah case. The court in that case on the last page, Page 738, states halfway down the first column, "Under Rule 37(d), sanctions are justified without reference as to whether the inexcused failure to make discovery was willful. The sanction of default judgment is justified where there has been a frustration of the judicial process where the failure to respond to discovery in each trial on the merits make it impossible to ascertain whether the allegations of the answer have any factual merit."

It's important to note that the original complaint was filed back in 1982; and our summary judgment motion went to issues that the plaintiff readily responded to as being out of date; namely, whether the mausoleum was built or not. These interrogatories that were sent and received the 15th, the amended complaint went right to the heart of this case. The contentions in the interrogatories, is whether they still claim a certain cause of action exists and what the factual basis for that is, we do not have in time to prepare this motion today. We only have just seen them.

Now, this same case, the Gardner case, on Page 737 in that case, the party that had answered late had received answers to interrogatories between the time they were due; between the motion for sanctions and the time for hearing. And the Court said that is not good enough. That is a failure to answer, and failure all by itself, provides the impetus for the invoking of sanctions. Once the motion has been filed, you can't put a last-minute answer in and remedy your problem.

We've got a trial date set in this case for July 6th. If the Court were to combine these motions with the motion for summary judgment that Mr. Peck is going to argue the merits in this case is so negligible, combined with this failure to answer on time that we think the appropriate entry be a default judgment.

Thank you, your Honor.

THE COURT: Thank you.

MR. BERTCH: The mailing certificate on the interrogatories does reveal it was mailed allegedly April 29th, 1988. Now, my secretary tells me that we didn't receive it. And I have no reason to doubt her word. I was on vacation from June the 3rd to June 12th. While I was gone, Mr. Henriod gave my office the courtesy of a phone call to see if there was a mix-up or a problem. And in fact, my secretary indicated that she hadn't got the

interrogatories. And so he sent over another copy.

When I got back from vacation, I prepared the answer. The only living plaintiff left was on vacation the last part of last week, and was unable to sign them until last night. So, I did exercise as much diligence as I could once we actually got the discovery in our office.

If I could just step back and put this in the big picture. The real problem is, they waited until the last minute to send the interrogatories. And then, when we were possibly a few days late on it, there was no extra time left. And in the context of a seven-year-old case, it doesn't seem fair to me to do that. To send interrogatories and require answers eight days before the discovery deadline and then complain if they're not answered strictly within 30 days.

I would suggest to the Court, that we not delay the trial date. That's assuming that the Court does not grant their motions for summary judgment. The matter in the interrogatories is, for the most part, cumulative of things that we have already discovered. The defendant has had an opportunity to take depositions of both plaintiffs while they were still living, then Erma is still with us. Did not inquire into these matters at that time.

The only new matter in the fifth amended complaint has to do with the allegations that the mausoleum as built didn't look like the ones that were shown to the plaintiffs.

Exhibit F

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

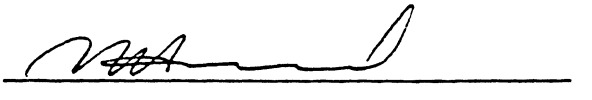
STATE OF UTAH

GEORGE K. SCHONEY IRMA J. SCHONEY, et al., Plaintiff, vs. MEMORIAL ESTATES, INC. et al., Defendants.	CERTIFICATE OF SERVICE Civil No. C82-4983 (Judge Richard H. Moffat)

I hereby certify that on the 12th day of January, 1988, Supplementary Answers to Interrogatories was hand delivered to the following:

Daniel F. Bertch
Robert J. DeBry
Robert J. DeBry & Associates
Attorneys for Plaintiffs
4001 South 700 East, 5th floor
Salt Lake City, Utah 84107

DATED this 12 day of January, 1988.



CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered a true copy of the foregoing Certificate of Service, this 12 day of January, 1988, to:

Daniel F. Bertch
Robert J. DeBry
Robert J. DeBry & Associates
Attorneys for Plaintiffs
4001 South 700 East, 5th floor
Salt Lake City, Utah 84107